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ARTHUR UNDERHILL, M.A.,  
OF LINCOLN'S INN, BARRISTER-AT-LAW;

ASSISTED BY

CLAUDE C. M. PLUMPTRE,  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.  
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# PREFACE

TO THE SECOND EDITION.



THE fact that a thousand copies, constituting the First Edition, of this Work have been sold in less than five years, renders it no longer necessary to justify its existence.

In this Edition the First Chapter has been completely re-written, and new Chapters upon Injunctions, Negligence, and Fraud have been added. Nearly sixty pages of new matter have been interpolated by these means, and by additions to previously existing chapters, and the whole has been carefully corrected and revised.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text book

separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

It only remains to render most grateful thanks to my friend and former pupil, Mr. Claude C. M. Plumptre, of the Common Law Bar, who has kindly taken upon himself the sole burden of revising (and in some measure rewriting) the whole of that portion of the Work which relates to particular Torts, with the exception of the Chapters on Nuisances, Trespasses, and Infringements of Trade Marks, Patent-right, and Copyright. By his labours mine have been greatly diminished, and the utility of the Work materially increased.

ARTHUR UNDERHILL.

23, SOUTHAMPTON BUILDINGS, CHANCERY LANE,  
*July 19th, 1878.*

# CONTENTS.



	PAGE
PREFACE . . . . .	iii
TABLE OF CASES CITED. . . . .	ix



## PART I. OF TORTS IN GENERAL.



### CHAPTER I.

OF WRONGS PURELY EX DELICTO . . . . .	3
---------------------------------------	---



### CHAPTER II.

OF QUASI TORTS . . . . .	24
--------------------------	----



### CHAPTER III.

OF THE LIABILITY OF A MASTER FOR HIS SERVANTS' TORTS . . . . .	29
-------------------------------------------------------------------	----

PT. I. OF TORTS IN GENERAL—*continued*.

## CHAPTER IV.

	PAGE
OF THE LIMITATION OF ACTIONS EX DELICTO . . .	51

---

## CHAPTER V.

OF THE MEASURE OF DAMAGES IN ACTIONS OF TORT . . .	55
----------------------------------------------------	----

---

## CHAPTER VI.

OF INJUNCTIONS TO RESTRAIN THE CONTINUANCE OF TORTS . . . . .	71
------------------------------------------------------------------	----

---

## PART II.

## OF RULES RELATING TO PARTICULAR TORTS.

## CHAPTER I.

OF DEFAMATION . . . . .	83
-------------------------	----

---

## CHAPTER II.

OF MALICIOUS PROSECUTION . . . . .	99
------------------------------------	----

PT. II. OF RULES RELATING TO PARTICULAR TORTS—*contd.*

## CHAPTER III.

	PAGE
OF FALSE IMPRISONMENT AND MALICIOUS ARREST . . . . .	105

## CHAPTER IV.

OF ASSAULT AND BATTERY . . . . .	118
----------------------------------	-----

## CHAPTER V.

OF BODILY INJURIES CAUSED BY NUISANCES . . . . .	125
--------------------------------------------------	-----

## CHAPTER VI.

OF NEGLIGENCE . . . . .	135
-------------------------	-----

## CHAPTER VII.

OF ADULTERY AND SEDUCTION . . . . .	149
-------------------------------------	-----

## CHAPTER VIII.

OF TRESPASS TO LAND AND DISPOSSESSION . . . . .	159
-------------------------------------------------	-----

## CHAPTER IX.

OF PRIVATE NUISANCES AFFECTING REALTY . . . . .	173
-------------------------------------------------	-----



PT. II. OF RULES RELATING TO PARTICULAR TORTS—*contd.*

## CHAPTER X.

	PAGE
OF FRAUD AND DECEIT . . . . .	201

## CHAPTER XI.

OF TRESPASS TO AND CONVERSION OF CHATTELS .	209
---------------------------------------------	-----

## CHAPTER XII.

OF INFRINGEMENTS OF TRADE MARKS AND PATENT AND COPYRIGHT . . . . .	222
-----------------------------------------------------------------------	-----

# TABLE OF CASES CITED.

## A.

PAGE

Abbot <i>v.</i> McFie .. .. .	140
Acton <i>v.</i> Blundell .. .. .	192
Aldred <i>v.</i> Constable .. .. .	210
Allen <i>v.</i> Howard .. .. .	38
— <i>v.</i> New Gas Company .. .. .	43
Allsopp <i>v.</i> Allsopp .. .. .	90
Alton <i>v.</i> Midland Railway Company .. .. .	25
American Cloth Company <i>v.</i> American Leather Cloth Company	223
Ancaster <i>v.</i> Milling .. .. .	61
Anderson <i>v.</i> Radcliffe .. .. .	164
Angus <i>v.</i> Dalton .. .. .	186
Arcedeckne <i>v.</i> Kelk .. .. .	188
Armory <i>v.</i> Delamirie .. .. .	69, 214
Ashby <i>v.</i> White .. .. .	5, 8
Asher <i>v.</i> Whitlock .. .. .	164, 167, 168
Ashwix <i>v.</i> Stanwix .. .. .	47
Atkinson <i>v.</i> Gateshead Water Company .. .. .	20
Attorney-General <i>v.</i> Mayor, &c. of Birmingham .. .. .	77
Aynsley <i>v.</i> Glover .. .. .	73, 187, 188

## B.

Back <i>v.</i> Stacy .. .. .	186
Backhouse <i>v.</i> Bonomi .. .. .	49—53, 181
Bailey <i>v.</i> Manchester, Sheffield and Lincoln Railway Co. .. .. .	29, 35
— <i>v.</i> Walford .. .. .	203
Baldwin <i>v.</i> Casella .. .. .	142
Balme <i>v.</i> Hutton .. .. .	213
Bamford <i>v.</i> Turnley .. .. .	177
Barely <i>v.</i> Mathews and Wife .. .. .	102
Barnes <i>v.</i> Wurd .. .. .	125, 131
Barry <i>v.</i> Croskey .. .. .	26
Bartonshill Coal Company <i>v.</i> Reid .. .. .	30, 44
Barwick <i>v.</i> English Joint Stock Bank .. .. .	204
Baseley <i>v.</i> Clarkson .. .. .	14

	PAGE
Battishill <i>v.</i> Reid .. .. .	177
Baxter <i>v.</i> Taylor .. .. .	200
Bayliss <i>v.</i> Fisher .. .. .	67
——— <i>v.</i> Lawrence .. .. .	87
Beard <i>v.</i> Egerton .. .. .	231
Beaver <i>v.</i> Mayor, &c. of Manchester .. .. .	162
Beckford <i>v.</i> Hood .. .. .	20
Beckwith <i>v.</i> Philby .. .. .	106
——— <i>v.</i> Shoredike .. .. .	11
Beddingfield <i>v.</i> Onslow .. .. .	200
Bedford <i>v.</i> M'Kowl .. .. .	56, 157
Bell <i>v.</i> Stone .. .. .	84
——— <i>v.</i> Walker .. .. .	240
Benjamin <i>v.</i> Storr .. .. .	9
Bennett <i>v.</i> Alcott .. .. .	154
Binks <i>v.</i> S. Y. and R. D. R. Co. . . . .	127
Bird <i>v.</i> Jones .. .. .	105
——— <i>v.</i> Randall .. .. .	153
Bishop of London's ease .. .. .	211
Bishop <i>v.</i> Trustees of Bedford Charity .. .. .	125
Blake <i>v.</i> Lanyon .. .. .	152
Bloodworth <i>v.</i> Gray .. .. .	91
Blyth <i>v.</i> Topham .. .. .	131
Blythe <i>v.</i> Birmingham Water Company .. .. .	136
Bogue <i>v.</i> Houlston .. .. .	236
Bolingbroke <i>v.</i> Swindon Local Board .. .. .	42
Bolch <i>v.</i> Smith .. .. .	132
Bonomi <i>v.</i> Backhouse .. .. .	181
Booth <i>v.</i> Mister .. .. .	41
Boulton <i>v.</i> Watt .. .. .	234
Bower <i>v.</i> Cook .. .. .	166
Boyle <i>v.</i> Tamlin .. .. .	159
Bradley <i>v.</i> Copley .. .. .	213
Bradshaw <i>v.</i> Lancashire and Yorkshire Railway Company .. .. .	146
Braham <i>v.</i> Bustard .. .. .	226
Bramley <i>v.</i> Chesterton .. .. .	63
Brassington <i>v.</i> Lewellyn .. .. .	169
Brewer <i>v.</i> Dew .. .. .	67
——— <i>v.</i> Sparrow .. .. .	220
Britton <i>v.</i> South Western Railway Company .. .. .	57
Broad <i>v.</i> Hain .. .. .	102
Brook <i>v.</i> Ashton .. .. .	231
——— <i>v.</i> Copeland .. .. .	143
Brown <i>v.</i> Boorman .. .. .	24
——— <i>v.</i> Dawson .. .. .	164
——— <i>v.</i> Robins .. .. .	184, 185
Bullen <i>v.</i> Langdon .. .. .	198
Burgess <i>v.</i> Burgess .. .. .	227
——— <i>v.</i> Gray .. .. .	38
——— <i>v.</i> Great Western Railway Company .. .. .	134

	PAGE
Burroughs v. Bayne .. .. .	209
Bury v. Bedford .. .. .	227
Butcher v. Butcher .. .. .	164
Butt v. Imperial Gas Company .. .. .	7
Byrne v. Boodle .. .. .	146

## C.

Calcraft v. Harborough .. .. .	151
Calder v. Halkett .. .. .	112
Campbell v. Scott .. .. .	240
Can v. Lambert .. .. .	197
Cauham v. Fisk .. .. .	189
Carlyon v. Lavering .. .. .	192
Carpenter v. Smith .. .. .	232
Carr v. Clark .. .. .	154
— v. Hood .. .. .	97
Carslake v. Mapledrum .. .. .	91
Cary v. Kearsley .. .. .	238
Cave v. Mountain .. .. .	111
Chandler v. Robinson .. .. .	185
Chapman v. Pickersgill .. .. .	9
Chasemore v. Richards .. .. .	191, 192
Chester v. Holyhead Railway Company .. .. .	132
Chinery v. Viall .. .. .	69
Christie v. Cowell .. .. .	91
Christopherson v. Bare .. .. .	119, 120
Churchill v. Siggers .. .. .	99
Cibber v. Sloper .. .. .	152
City Commissioners of Sewers v. Glass .. .. .	198
Clark v. Freeman .. .. .	75, 85
Clarke v. Clark .. .. .	78, 150
Clay v. Roberts .. .. .	85
Clements v. Chivis .. .. .	85
Cliff v. Midland Railway Company .. .. .	139
Cobbett v. Gray .. .. .	119
Cockroft v. Smith .. .. .	121
Cocks v. Chandler .. .. .	226
Coggs v. Bernard .. .. .	27
Collins v. Evans .. .. .	202
— v. Midland Level Commissioners .. .. .	62
Compton v. Richards .. .. .	189
Cook v. Wildes .. .. .	96
Cooper v. Beale .. .. .	121
— v. Booth .. .. .	104
— v. Hubbock .. .. .	188
— v. Marshall .. .. .	199
— v. Willomat .. .. .	210, 213

	PAGE
Couch v. Steel .. .. .	19, 20
Coutts v. Gorham .. .. .	.. 189
Covell v. Laming .. .. .	.. 120
Coward v. Baddeley .. .. .	.. 120
Cowles v. Potts .. .. .	.. 97
Cox v. Burbidge .. .. .	.. 141
— v. Glue .. .. .	.. 164
— v. Lee .. .. .	.. 85
— v. Mousley .. .. .	.. 164
Coxhead v. Richards .. .. .	.. 97
Crane v. Price .. .. .	230, 231
Crespigny v. Wellesley .. .. .	.. 94
Cresswell v. Hedges .. .. .	.. 165
Croft v. Alison .. .. .	.. 31
Crossley v. Lightowler .. .. .	191, 192
Crump v. Lambert .. .. .	.. 195
Cubitt v. Porter .. .. .	.. 166
Curriers' Company v. Corbet .. .. .	.. 74
Cuthbertson v. Parson .. .. .	.. 42

## D.

D'Almaine v. Boosey .. .. .	.. 238
Dalton v. South Eastern Railway Company .. .. .	60, 146
Dand v. Sexton .. .. .	.. 209
Dangerfield v. Jones .. .. .	.. 231
Daniel v. Metropolitan Railway Company .. .. .	.. 136
Dansey v. Richardson .. .. .	.. 162
Davis v. Eley .. .. .	.. 113
— v. London and North Western Railway Company .. .. .	.. 64
— v. Marshall .. .. .	.. 189
— v. Russell .. .. .	.. 107
— v. Snead .. .. .	.. 95
— v. Solomon .. .. .	.. 90
— v. Williams .. .. .	155, 199
Dawkins v. Lord Paulet .. .. .	95, 109
— v. Lord Rokesby .. .. .	.. 96
Deau v. Peel .. .. .	.. 154
Degg v. M. R. Co. .. .. .	.. 50
Delaney v. Fox .. .. .	.. 168
Dent v. Auction Mart Company .. .. .	72, 186
Dere v. Guest .. .. .	.. 78
Derry v. Handley .. .. .	.. 93
Dickenson v. Grand Junction Canal Company .. .. .	.. 191
— v. North Eastern Railway Company .. .. .	.. 145
Dickson v. Hilliard .. .. .	.. 95
Digby v. Thompson .. .. .	.. 84
Dixon v. Bell .. .. .	59, 135
Dobell v. Stevens .. .. .	.. 202

	PAGE
Dobson v. Blackmore .. .. .	200
Dockwray v. Dickenson .. .. .	68
Doe d. Carter v. Bernard .. .. .	168
— d. Johnston v. Baytup .. .. .	168
— d. Knight v. Merryweather .. .. .	168
— d. North v. Webber .. .. .	169
— d. Oliver v. Powell .. .. .	168
Donaldson v. Beckett .. .. .	235
Doswall v. Impey .. .. .	109
Dunn v. Birmingham Canal Company .. .. .	184
Durrell v. Pritchard .. .. .	78
Dyner v. Leach .. .. .	48

## E.

Eager v. Grimwood .. .. .	158
Eardley v. Earl Granville .. .. .	160
Eaton v. Johns .. .. .	85
Edgebury v. Stephens .. .. .	231
Edwards v. Clay .. .. .	53
— v. Crock .. .. .	151
Elliott v. Kemp .. .. .	214
— v. North Eastern Railway Company .. .. .	77
Elliottson v. Fieldham .. .. .	180
Ellis v. Loftus Iron Company .. .. .	210
— v. Sheffield Gas Company .. .. .	39
— v. Great Western Railway Company .. .. .	139
Elsam v. Fawcett .. .. .	151
Embrey v. Owen .. .. .	191
Evans v. Edmonds .. .. .	202
— v. Evans .. .. .	150
— v. Walton .. .. .	153
Every v. Smith .. .. .	165

## F.

Faldo v. Ridge .. .. .	161
Falvey v. Stanford .. .. .	57
Farley v. Danks .. .. .	99
Feltham v. England .. .. .	45
Fenn v. Bittleston .. .. .	213
Fenwick v. East London Railway Company .. .. .	72
Fetter v. Beale .. .. .	64
Fitzjohn v. MacKinder .. .. .	100, 101
Fletcher v. Rylands .. .. .	160
Flight v. Thomas .. .. .	180
Fordham v. L., B. & S. C. R. Co. .. .. .	138

	PAGE
Foster v. Foster .. .. .	151
Fouldes v. Willoughby .. .. .	209
Foulger v. Newcombe .. .. .	91
Fox v. Broderick .. .. .	86
France v. Gaudet .. .. .	58
Francis v. Cockerell .. .. .	42
Franklin v. South Eastern Railway Company ..	60, 145, 146
Frewen v. Phillips .. .. .	189
Fryer v. Kinnersley .. .. .	97

## G.

Galway v. Marshall .. .. .	92
Gardiner v. Slade .. .. .	97
Gatherecole v. Miall .. .. .	98
Gayford v. Moffat .. .. .	194
Gee v. Pritchard .. .. .	75
General Omnibus Company v. Limpus .. .. .	31
George and Richard, The .. .. .	19
Gibbs v. Cole .. .. .	233
Gilpin v. Fowler .. .. .	97
Gladman v. Johnston .. .. .	143
Glave v. Harding .. .. .	189
Glover v. South Western Railway Company ..	60
Goff v. Great Northern Railway Company ..	35
Goldsmid v. Tunbridge Wells Company ..	75, 77
Goodtitle v. Alder .. .. .	164
Gordon v. Cheltenham Railway Company ..	79
Gorris v. Scott .. .. .	21
Gott v. Gandy .. .. .	129
Gourley v. Plimsoll .. .. .	84
Grainger v. Hill .. .. .	105
Gray v. Gray .. .. .	84
Great Western Railway Company v. Bennett ..	184
Great Western Railway Company v. Fawcett ..	132
Greatrex v. Hayward .. .. .	194
Green v. Britton .. .. .	88
Greenslade v. Halliday .. .. .	200
Greensland v. Chaplin .. .. .	140
Gregory v. Piper .. .. .	42, 159
Gregory v. Williams .. .. .	61
Greville v. Chapman .. .. .	85
Griffin v. Coleman .. .. .	106, 107, 122
Griffiths v. Gidlow .. .. .	49
Griffiths v. Teetjen .. .. .	155
Gwinmell v. Eamer .. .. .	130



## H.

	PAGE
Haddesdon <i>v.</i> Gryssel .. .. .	210
Hadley <i>v.</i> Baxendale .. .. .	70
—— <i>v.</i> Taylor .. .. .	8
Hall <i>v.</i> Johnson .. .. .	43
Hambleton <i>v.</i> Vere .. .. .	57
Hammer <i>v.</i> Knowles .. .. .	184
Hamnack <i>v.</i> White .. .. .	146
Hammond <i>v.</i> St. Pancras Vestry .. .. .	11
Haukinson <i>v.</i> Bilby .. .. .	85
Hannam <i>v.</i> Mockett .. .. .	161
Hardcastle <i>v.</i> S. W. and Y. D. Railway Company .. .. .	127
Harding <i>v.</i> King .. .. .	124
Hardy <i>v.</i> Ryle .. .. .	54
Harris <i>v.</i> Butler .. .. .	154
Harrison <i>v.</i> Bush .. .. .	86, 95
—— <i>v.</i> Taylor .. .. .	224, 226
Hart <i>v.</i> Humpack .. .. .	95
Harwood <i>v.</i> Great Northern Railway Company .. .. .	230
Hedges <i>v.</i> Tagg .. .. .	155
Henderson <i>v.</i> Broomhead .. .. .	96, 109
—— <i>v.</i> Harrison .. .. .	95
Hesley <i>v.</i> Chapinan .. .. .	100
Heydon and Smith's case .. .. .	68
Hide <i>v.</i> Thoruborough .. .. .	186
Higgins <i>v.</i> Andrews .. .. .	217
Hilberry <i>v.</i> Hatton .. .. .	211
Hill <i>v.</i> Evans .. .. .	230
Hinton <i>v.</i> Heather .. .. .	100
Hiscox <i>v.</i> Greenwood .. .. .	212
Hodgson <i>v.</i> Scarlett .. .. .	96
Hogg <i>v.</i> Ward .. .. .	107
Hole <i>v.</i> Barlow .. .. .	179
Holker <i>v.</i> Porrit .. .. .	193
Holmes <i>v.</i> Goring .. .. .	195
—— <i>v.</i> Mather .. .. .	136
—— <i>v.</i> Worthington .. .. .	49
Holt <i>v.</i> Schokfield .. .. .	91
Hooper <i>v.</i> Gruscott .. .. .	87
Hopper <i>v.</i> Reeve .. .. .	120
Houlden <i>v.</i> Smith .. .. .	111
Hounsel <i>v.</i> Smith .. .. .	127
Huckle <i>v.</i> Money .. .. .	55
Hughes <i>v.</i> McFie .. .. .	140
Hull <i>v.</i> Pickersgill .. .. .	36
Humphreys <i>v.</i> Brogden .. .. .	175, 180, 181
Huntley <i>v.</i> Simpson .. .. .	100
Hurdman <i>v.</i> North Eastern Railway Company .. .. .	14

## I.

	PAGE
Ianson v. Stewart .. .. .	84
Inchbald v. Robinson .. .. .	176
——— v. Barrington .. .. .	176
Indermaur v. Dames .. .. .	16, 133
Irwin v. Brandwood .. .. .	91
Iveson v. Moore .. .. .	5

## J.

Jacobs v. Senard .. .. .	165, 216
Jamond v. Knight .. .. .	189
Job v. Potton .. .. .	165
Joel v. Morrison .. .. .	41
John v. Bacon .. .. .	136
Johnson v. Emerson .. .. .	99
——— v. Stear .. .. .	69
Johnstone v. Sutton .. .. .	99, 101
Jones v. Boyce .. .. .	58
——— v. Chapman .. .. .	163
——— v. Herne .. .. .	90
——— v. Stevens .. .. .	65
Jupe v. Pratt .. .. .	234

## K.

Keats v. Cadogan .. .. .	129
Keene v. Reynolds .. .. .	161
Kelly v. Sherlock .. .. .	56, 65
——— v. Tinling .. .. .	95, 98
Kemp v. Neville .. .. .	109
Kendillon v. Maltby .. .. .	192
Kidgell v. Moore .. .. .	200
King v. Rose .. .. .	211
Kirk v. Gregory .. .. .	210
Knight v. Gex .. .. .	38
Knott v. Morgan .. .. .	227

## L.

Lacy v. Rhys .. .. .	241
Lafond v. Ruddock .. .. .	54
Lamine v. Dorrell .. .. .	220
Lancashire Waggon Company v. Fitzhugh .. .. .	215
Lancaster Canal Company v. Parnaby .. .. .	131, 132
Langridge v. Levy .. .. .	26, 201, 202
Latham v. Latham and Gethin .. .. .	150

	PAGE
Laugher v. Pointer .. .. .	37
Laughton v. Bishop of Sodor .. .. .	95
Lawless v. Anglo-Egyptian Cotton Company .. .. .	95
Lawrence v. Obee .. .. .	159
Lay v. M. Railway Company .. .. .	141
Lenke v. Loveday .. .. .	214
Leary v. Patrick .. .. .	114
Leather Cloth Company v. American Leather Cloth Company	227
Lee v. Riley .. .. .	159
Legg v. Tucker .. .. .	281
Lewis v. Levy .. .. .	96
—— v. Marling .. .. .	231
Ley v. Peter .. .. .	170
Linpus v. General Omnibus Company .. .. .	31
Longmeid v. Holiday .. .. .	26
Lovell v. Howell .. .. .	44
Low v. Wood .. .. .	236
Lumley v. Guy .. .. .	87, 88, 152
Lynch v. Knight .. .. .	87
—— v. Nurdin .. .. .	140
Lyons v. Martin .. .. .	42

## M.

Mackay v. Commercial Bank of New Brunswick .. .. .	205
Mackey v. Ford .. .. .	96
Macpherson v. Daniels .. .. .	84, 92
Magor v. Chadwick .. .. .	194
Manby v. Witt .. .. .	97
Mangan v. Atterton .. .. .	141
Manley v. Field .. .. .	154
Marsh v. Keating .. .. .	220
—— v. Loader .. .. .	106
Marshall v. York, &c. Railway Company .. .. .	26
Martin v. Great Northern Railway Company .. .. .	134
—— v. Strachan .. .. .	167
Martindale v. Smith .. .. .	214
Mason v. Caesar .. .. .	199
—— v. Williams .. .. .	205
Masper and wife v. Brown .. .. .	124
Maxwell v. Hogg .. .. .	237
May v. Burdett .. .. .	141
Mayall v. Higby .. .. .	240
Mayhew v. Herricks .. .. .	216
M'Andrew v. Bassett .. .. .	226
M'Gregor v. Thwaites .. .. .	94, 96
M'Leod v. Whateley .. .. .	97
M'Manus v. Cricket .. .. .	42
Mears v. London and South Western Railway Company .. .. .	215

	PAGE
Mellors <i>v.</i> Shaw .. .. .	47
Merest <i>v.</i> Harvey .. .. .	67
Metropolitan Assurance Company <i>v.</i> Petch .. .. .	200
———— Saloon Omnibus Company <i>v.</i> Hawkins .. .. .	85
———— Railway Company <i>v.</i> Jackson .. .. .	147
Miller <i>v.</i> Hope and Shaw .. .. .	109
Milligan <i>v.</i> Wedge .. .. .	38
Millington <i>v.</i> Fox .. .. .	224
Mitchell <i>v.</i> Crasweller .. .. .	31, 42
Moore <i>v.</i> Robinson .. .. .	213
Morgan <i>v.</i> Lingen .. .. .	85
———— <i>v.</i> Vale of Neath Company .. .. .	43, 44
———— <i>v.</i> Hughes .. .. .	111
Morris <i>v.</i> Morris .. .. .	151
Mortimer <i>v.</i> Craddock .. .. .	69
Mullett <i>v.</i> Mason .. .. .	62
Mumford <i>v.</i> O., W. and W. Rail. Co. .. .. .	200
Murchie <i>v.</i> Black .. .. .	180
Murray <i>v.</i> Currie .. .. .	42
———— <i>v.</i> Hall .. .. .	165

## N.

Nelson <i>v.</i> The Liverpool Brewery Company .. .. .	130
Nichols <i>v.</i> Marsland .. .. .	13, 160
Norris <i>v.</i> Baker .. .. .	199
North-Eastern Railway Company <i>v.</i> Elliott .. .. .	185
Northampton <i>v.</i> Ward .. .. .	164
Notley <i>v.</i> Buck .. .. .	220
Novello <i>v.</i> Sudlow .. .. .	22
Nuttal <i>v.</i> Bracewell .. .. .	193

## O.

Olliott <i>v.</i> Bessey .. .. .	112
Onslow and Whalley's ease, Queen <i>v.</i> Castro .. .. .	113
Ormond <i>v.</i> Holland .. .. .	47
Osborn <i>v.</i> Gillet .. .. .	146, 156
Oughton <i>v.</i> Seppings .. .. .	220
Overton <i>v.</i> Freeman .. .. .	42
Oxley <i>v.</i> Watts .. .. .	216

## P.

Page <i>v.</i> Edulgee .. .. .	214
Palmer <i>v.</i> Paul .. .. .	77
Paris <i>v.</i> Levy .. .. .	98
Parkins <i>v.</i> Scott .. .. .	92

	PAGE
Partridge v. Scott .. .. .	185
Pasley v. Freeman .. .. .	201
Patent Bottle Company v. Spencer .. .. .	231
Patrick v. Colerick .. .. .	161
Pattison v. Jones .. .. .	97
Payne v. Rivan .. .. .	100
Peake v. Oldham .. .. .	91
Pearson v. Cox .. .. .	37
— v. Spencer .. .. .	195
Peck v. Gurney .. .. .	206
Penn v. Jack .. .. .	59, 233
Percival v. Phipps .. .. .	76
Perryman v. Lister .. .. .	101
Phillips v. Jansen .. .. .	92
Pickering v. Dowson .. .. .	207
Pillott v. Wilkinson .. .. .	217
Pinnington v. Gallard .. .. .	195
Pippin v. Sheppard .. .. .	26
Pope v. Curl .. .. .	76
Popplewell v. Hodgkinson .. .. .	184
Potter v. Faulkner .. .. .	50
Potts v. Smith .. .. .	188
Poulton v. London and South Western Railway Company .. .. .	33
Pretty v. Birkmore .. .. .	129
Prince Albert v. Strange .. .. .	240
Princess Royal, The .. .. .	23
Procter v. Hodgson .. .. .	194
Pryce v. Belcher .. .. .	5
Pym v. Great Northern Railway Company .. .. .	145, 146

## Q.

Quarman v. Burnett .. .. .	38
----------------------------	----

## R.

R. v. Burdett .. .. .	86
— v. Huggins .. .. .	141
— v. Revel .. .. .	113
— v. Rosswell .. .. .	199
— v. Wheeler .. .. .	229
Rapson v. Cubitt .. .. .	37
Rawlings v. Tilt .. .. .	119
Raynor v. Mitchell .. .. .	31
Read v. Coker .. .. .	119
— v. Edwards .. .. .	212
— v. Great Eastern Railway Company .. .. .	146

	PAGE
Reade <i>v.</i> Conquest .. .. .	239
— <i>v.</i> Lacy .. .. .	239
Reddie <i>v.</i> Scoolt .. .. .	156
Reon <i>v.</i> Smith .. .. .	109
Reyse <i>v.</i> Powell .. .. .	164
Rhodes <i>v.</i> Smethurst .. .. .	54
Rich <i>v.</i> Basterfield .. .. .	130
Richards <i>v.</i> Rose .. .. .	186
Richardson <i>v.</i> Mellish .. .. .	63
— <i>v.</i> Great Eastern Railway Company .. .. .	136
— <i>v.</i> Metropolitan Railway Company .. .. .	138
— <i>v.</i> North Eastern Railway Company .. .. .	136
Rigby <i>v.</i> Hewitt .. .. .	140
Rist <i>v.</i> Taux .. .. .	154
Roberts <i>v.</i> Roberts .. .. .	89
— <i>v.</i> Rose .. .. .	199
— <i>v.</i> Smith .. .. .	47
Robson <i>v.</i> Whittingham .. .. .	186
Rosswell <i>v.</i> Pryor .. .. .	130
Rourke <i>v.</i> White Moss Company .. .. .	40
Rowbotham <i>v.</i> Wilson .. .. .	180, 185
Rowcliffe <i>v.</i> Edwards .. .. .	90
Russell <i>v.</i> Cowley .. .. .	230
— <i>v.</i> Horne .. .. .	120
Rylands <i>v.</i> Fletcher .. .. .	13
Ryan <i>v.</i> Clark .. .. .	164

## S.

Saloman <i>v.</i> Vintners' Company .. .. .	186
Satherthwaite <i>v.</i> Dewhurst .. .. .	154
Saunders <i>v.</i> Edwards .. .. .	98
— <i>v.</i> Merryweather .. .. .	168
Savory <i>v.</i> Price .. .. .	233
Sayre <i>v.</i> Moore .. .. .	237
Scattergood <i>v.</i> Silvester .. .. .	221
Schneider <i>v.</i> Heath .. .. .	208
Scott <i>v.</i> Dock Company .. .. .	11, 146
— <i>v.</i> Shepherd .. .. .	15, 16, 121
— <i>v.</i> Stamford .. .. .	238
— <i>v.</i> Stansfield .. .. .	96, 110
Searle <i>v.</i> Prentice .. .. .	24
Senior <i>v.</i> Ward .. .. .	48
Seymour <i>v.</i> Greenwood .. .. .	35
Sharp <i>v.</i> Hancock .. .. .	192
— <i>v.</i> Powell .. .. .	18
Sheaban <i>v.</i> Ahearn .. .. .	84
Shepherd <i>v.</i> Midland Railway Company .. .. .	18
Simmon <i>v.</i> Milligan .. .. .	109

	PAGE
Simpson <i>v.</i> Holliday .. .. .	233
— <i>v.</i> Savage .. .. .	200
Simson <i>v.</i> London General Omnibus Company ..	137
Singer Machine Company <i>v.</i> Wilson .. ..	224, 225, 226
Singleton <i>v.</i> Eastern Counties Railway Company ..	140
Six Carpenters' case .. .. .	163
Sketton <i>v.</i> London and North Western Railway Company ..	139
Slater <i>v.</i> Swann .. .. .	211
Smith <i>v.</i> Fletcher .. .. .	160
— <i>v.</i> Great Eastern Railway Company .. ..	137
— <i>v.</i> Hughes .. .. .	206
— <i>v.</i> Lloyd .. .. .	171
— <i>v.</i> Miller .. .. .	213
— <i>v.</i> Smith .. .. .	75
— <i>v.</i> Thackerah .. .. .	181
Solton <i>v.</i> De Held .. .. .	176
Somerville <i>v.</i> Hawkins .. .. .	95
Southcote <i>v.</i> Stanley .. .. .	133
Southee <i>v.</i> Denning .. .. .	92
Southey <i>v.</i> Sherwood .. .. .	236
Spark <i>v.</i> Heslop .. .. .	59
Speill <i>v.</i> Maule .. .. .	87, 95
Spiers <i>v.</i> Brown .. .. .	238
Spokes <i>v.</i> Banbury Local Board .. .. .	77
Spooner <i>v.</i> Brewster .. .. .	210
St. Helens' Company <i>v.</i> Tippings .. .. .	177, 178
Stapley <i>v.</i> London, Brighton and South Coast Railway Co. . .	139
Steadman <i>v.</i> Smith .. .. .	166
Stevens <i>v.</i> Jencocks .. .. .	21
Stockdale <i>v.</i> Hansard .. .. .	96
— <i>v.</i> Onwhyn .. .. .	236
Storey <i>v.</i> Ashton .. .. .	42
Straight <i>v.</i> Burn .. .. .	188
Street <i>v.</i> Gugwell .. .. .	177
Stróyan <i>v.</i> Knowles .. .. .	184
Stubley <i>v.</i> London and North Western Railway Company ..	139
Styles <i>v.</i> Cardiff Steam Company .. .. .	142
Sutliff <i>v.</i> Boothe .. .. .	193
Sutton <i>v.</i> Moody .. .. .	210
Swainson <i>v.</i> North Eastern Railway Company ..	46
Swanborough <i>v.</i> Coventry .. .. .	189
Sweetland <i>v.</i> Webber .. .. .	167
Swift <i>v.</i> Jewsbury .. .. .	205
Sykes <i>v.</i> Sykes .. .. .	227

## T.

Tancred <i>v.</i> Allgood .. .. .	214
Tuppling <i>v.</i> Jones .. .. .	188



	PAGE
Taylor <i>v.</i> Ashton .. .. .	202
—— <i>v.</i> Hawkins .. .. .	97
—— <i>v.</i> Whitehead .. .. .	162
—— <i>v.</i> Williams.. .. .	101
Terry <i>v.</i> Ashton .. .. .	128
—— <i>v.</i> Hutchinson .. .. .	155, 157
Thom <i>v.</i> Bigland .. .. .	203
Thomas <i>v.</i> Powell .. .. .	67
Thompson <i>v.</i> Barnard .. .. .	91
—— <i>v.</i> Shackell .. .. .	97
Thorpe <i>v.</i> Smallwood .. .. .	214
Tichborn <i>v.</i> Mostyn .. .. .	113
Timothy <i>v.</i> Simpson .. .. .	107
Tindal <i>v.</i> Bell .. .. .	63
Tinsley <i>v.</i> Lacy .. .. .	239
Tippings <i>v.</i> St. Helens' Company .. .. .	72, 175
Todd <i>v.</i> Flight .. .. .	127, 136
Tollit <i>v.</i> Shenstone .. .. .	25
Toomey <i>v.</i> London and Brighton Railway Company .. .. .	146
Tuberville <i>v.</i> Savage .. .. .	119
Tuff <i>v.</i> Worman .. .. .	138, 139
Tullidge <i>v.</i> Wade .. .. .	65, 124, 157
Tunney <i>v.</i> M. Railway Company .. .. .	44
Tunncliffe <i>v.</i> Teed .. .. .	123
Turner <i>v.</i> Doe .. .. .	171
—— <i>v.</i> Great Eastern Railway Company .. .. .	46
—— <i>v.</i> Hunt .. .. .	211

## U.

Underhill <i>v.</i> Ellicombe .. .. .	20
United Merthyr Company, Re .. .. .	58

## V.

Vaughan <i>v.</i> Menlove .. .. .	135
—— <i>v.</i> Watt .. .. .	217
Vaughton <i>v.</i> Bradshaw .. .. .	123
Venables <i>v.</i> Smith .. .. .	38
Verry <i>v.</i> Watkyns .. .. .	158
Vicars <i>v.</i> Wilcox .. .. .	88

## W.

Wakeley <i>v.</i> Cooke .. .. .	85
Wakeman <i>v.</i> Robinson .. .. .	11

	PAGE
Walker v. Brewster .. .. .	176
—— v. Brogden .. .. .	84
Walter v. Selfe .. .. .	176
Wulton v. Waterhouse .. .. .	168
Warburton v. Great Western Railway Company .. .. .	46
Ward v. Eyre .. .. .	211
—— v. Hobbs .. .. .	206
—— v. Weeks .. .. .	93
Warwick v. Foulkes .. .. .	65
Wason v. Warlter .. .. .	96
Watkins v. Hall .. .. .	84, 87, 92
Watling v. Oastler .. .. .	136
Weaver v. Ward .. .. .	121
Webb v. Paternoster .. .. .	190
Welch v. Knott .. .. .	225
Welfare v. London, Brighton and South Coast Rail. Co. .. .. .	42, 136
Wellock v. Constantino .. .. .	23
Wells v. Abrahams .. .. .	22
—— v. Head .. .. .	212
West v. Smallwood .. .. .	112
Weston v. Beeman .. .. .	100
Whatman v. Pearson .. .. .	42
Wheeler v. Whiting .. .. .	122
White v. Bass .. .. .	189
—— v. Hindley Local Board .. .. .	9
—— v. France .. .. .	133
—— v. Spettigue .. .. .	23
Whitehouse v. Fellows .. .. .	54
Whiteley v. Pepper .. .. .	31
Wiggett v. Fox .. .. .	42
Wild v. Pickford .. .. .	213
Wilkinson v. Hagarth .. .. .	165
Williams v. Clough .. .. .	48
Williamson v. Freer .. .. .	97
Wilson v. Barker .. .. .	36
—— v. Merry .. .. .	42
—— v. Newport Dock Company .. .. .	58
—— v. Tunnman .. .. .	36
Wingate v. Waite .. .. .	111
Winter v. Brockwell .. .. .	190
—— v. Henn .. .. .	151
Winterbottom v. Lord Derby .. .. .	7, 8
Withers v. North Kent Railway Company .. .. .	132, 136
Wood v. Boosey .. .. .	239
—— v. Ward .. .. .	191
Wooderman v. Baldock .. .. .	214
Worth v. Gilling .. .. .	142
Wren v. Weild .. .. .	87
Wright v. Howard .. .. .	191
—— v. Pearson .. .. .	143

							PAGE
Wright <i>v.</i> Tallis	..	..	..	..	..	..	236
<u>      </u> <i>v.</i> Woodgate	..	..	..	..	..	..	95
Wyatt <i>v.</i> White	..	..	..	..	..	..	103

## Y.

Yates <i>v.</i> Jack	..	..	..	..	..	..	186
Young <i>v.</i> Spencer	..	..	..	..	..	..	200
<u>      </u> <i>v.</i> Fernie	..	..	..	..	..	..	231

# PART I.

RULES RELATING TO TORTS IN GENERAL.



## CHAPTER 1.

### OF WRONGS PURELY EX DELICTO.

**The Object of Law.** “The maxims of law,” says Justinian, “are these: to live honestly, to hurt no man, and to give every one his due.” The practical object of jurisprudence must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and ensuring to every member of the community the full enjoyment of his rights and possessions.

**Public and Private Wrongs.** Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private wrongs. The former consist of such offences as, aiming at the root of society and order, are considered to be wrongs to the community at large; and as no redress can be given to the community, except by the prevention of such acts for the future, they are visited with some deterrent and exemplary punishment.

Private wrongs, or civil injuries, on the other hand, are such violations or deprivations of the legal rights of another, as are accompanied by either actual or presumptive damage. These being merely injuries

to private individuals, admit of redress. The law therefore affords a remedy, by forcing the wrongdoer to make reparation.

**Division of Private Wrongs.** But as wrongs are divided into criminal and civil, so the latter are subdivided into the two classes of wrongs *ex contractu*, and wrongs *ex delicto*; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, such as spring from infractions of the great social obligation, by which each member of the state is bound to do hurt to no man.

It is of the latter class that I am about to treat in this work.

**Definition of a Tort.** A tort is described in the Common Law Procedure Act, 1852, as “a wrong independent of contract;” but, although this is no doubt a very correct and all-embracing definition for the purposes of judicially determining what is and what is not a tort, it does not, I think, convey any very clear idea of the nature of it. I shall not, however, attempt to define what a tort is, but shall content myself with the less scientific but more intelligible method of describing it as follows:—

**RULE 1.**—A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such act or



omission either infringes some absolute right, to the uninterrupted enjoyment of which another is entitled, *or* causes to such other some substantial loss of money, health, or material comfort, beyond that suffered by the rest of the public.

It will be perceived that two distinct factors go to make a tort, viz. (1) a wrongful act or omission (see *Pryce v. Belcher*, 4 C. B. 866); and (2) either a consequent invasion of another's right (see *Ashby v. White*, 1 Sm. L. C. 284), *or* the consequent infliction upon him of some loss (see *Iveson v. Moore*, 1 Ld. Raym. 486). Neither of these two factors will, by itself, be sufficient to sustain an action for damages, although, as we shall see hereafter, the first may, under certain circumstances, be alone sufficient to sustain an action for an injunction. An invasion of a right, or the infliction of damage, unconnected with a wrongful act, is technically called a *damnum absque injuriâ*, and it is a maxim that *ex damno absque injuriâ non oritur actio*. Instances of this are given below, from which it will be seen that the greatest losses may be occasioned, the greatest discomfort caused, nay, in some instances, the greatest unhappiness may be inflicted, provided that the doer is careful only to do such acts, or to make such omissions, as the law authorizes him to do or make.

On the other hand, although a *damnum absque injuriâ* is no ground for an action for damages, the converse by no means holds good; for, as will be seen from the rule, the mere unlawful infringement

of a right is of itself a cause of action, without the infliction of any appreciable damage whatever, and it has been consequently said that *ex injuriâ sine damno oritur actio* (a).

The interruption, however temporary and however slight, of another's absolute right, is considered by law as a proper subject for reparation, and substantial damages have more than once been awarded where the surroundings of the plaintiff have been very considerably improved and his comforts very considerably heightened for the period during which the defendant has prevented him from exercising the right in question. But where no absolute right has been invaded, then some substantial loss of money, comfort, or health inflicted upon the plaintiff beyond that suffered by the rest of the public, by the unlawful act or omission, must be proved. The reason of this is very clear and very reasonable. In the case of the infringement of a right, there is a grievance peculiar to the party injured, as distinguished from the public generally; but where no right is infringed, but merely an unlawful act or omission committed or made, there the grievance is properly one affecting the public and not any private individual in par-

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(a) This maxim can obviously only be accurate by using the word *injuria* in the sense of a *private* injury, for a mere public wrong will not alone sustain an action. If, however, we use it in this sense in the maxim *ex damno sine injuriâ non oritur actio*, it becomes obvious that it is too narrow, because a loss caused connected with a *public* wrong is sufficient. I have therefore in this work used the word *injuria* in the sense of a wrongful act or omission, independently of the question whether such act or omission was wrongful only *quâ* some individual or *quâ* the public generally, and I have used the word *damnum* as signifying a private grievance.

ticular; and if every member of the public were allowed to bring actions in respect of it, there would be no limit to the number of actions which might be brought (*Winterbottom v. Lord Derby*, *L. R.*, 2 *Ex.* 316). The remedy of the public is by indictment, if the unlawful act amounts to so serious a dereliction of duty as to constitute an injury to the public. But if in addition to the injury to the public, a special, peculiar, and substantial damage is occasioned to an individual, then it is only just that he should have some private redress. Let us now glance at some illustrations of the foregoing rule:—

(1) If one trespasses upon another's land, that is the invasion of an absolute right; but if the trespass was committed in self-defence, in order to escape from some pressing danger, no action will lie in respect of it, because the law authorizes the commission of a trespass for such a purpose; and, therefore, although there was a *damnum*—namely, a private grievance, there was no *injuria* or wrongful act, and the trespass was consequently a *damnum absque injuria* (37 *Hen.* 6, 37, pl. 26).

(2) Again, if I own a shop which greatly depends for its custom upon its attractive appearance, and a company erect a gasometer hiding it from the public, no action is maintainable by me; because, although my trade may be ruined by the obstruction, yet the gas company are only doing an act authorized by law, namely, building upon their own land (*Butt v. Imperial Gas Co.*, *L. R.*, 2 *Ch. App.* 158).

(3) A legally qualified voter duly tenders his vote to the returning officer, who wrongly refuses to re-

gister it. The candidate for whom the vote was tendered gains the seat, and no loss whatever, either in money, comfort, or health, is suffered by the rejected voter; yet his absolute right to vote at the election is infringed, and that by an unlawful act of the returning officer, and hence we have here an *injuria* and a *damnum* sufficient to support an action (*Ashby v. White*, 1 Sm. L. C. 251).

(4) A man erected an obstruction in a public way. The plaintiff was delayed on several occasions in passing along it, being obliged, in common with every one else who attempted to use the road, either to pursue his journey by a less direct road, or else to remove the obstruction. It was held, however, that he could not maintain an action, because although there had been an unlawful act on the part of the defendant, yet there was no invasion of an absolute right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom v. Lord Derby*, L. R., 2 Ex. 316).

(5) The defendants left an unfenced hole upon premises of theirs adjoining a highway. The plaintiff, in passing along the highway at night, fell into the hole, and was injured. Here the plaintiff clearly suffered a special and substantial damage beyond that suffered by the rest of the public, and accordingly he recovered damages (*Hudley v. Taylor*, L. R., 1 C. P. 53).

(6) To give one more example similar to the last. The plaintiff kept a coffee-house in a narrow street. The defendants were auctioneers, carrying on an ex-

tensive business in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from their vans. The vans intercepted the light from the plaintiff's coffee-house to such an extent, that he was obliged to burn gas nearly all day, and access to his shop was obstructed, and the smell from the horses' manure made the house uncomfortable. Here there was a state of facts constituting a public nuisance, but there was also a direct and substantial private and particular damage to the plaintiff, beyond that suffered by the rest of the public, so as to entitle him to maintain an action (*Benjamin v. Storr*, *L. R.*, 9 *C. P.* 400; and see also *White v. Hindley Local Board*, *L. R.*, 10 *Q. B.* 219).

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**Of Injurix, or Wrongful Acts.** In the words of Pratt, C. J., "torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief" (see *Chapman v. Pickersgill*, 2 *Wils.* 146). It is, therefore, hopeless to attempt any definition of what constitutes a wrongful act or *injuria*, upon which an action for tort may be founded; but, broadly speaking, the following rule may, perhaps, give the student some standard by which to measure particular cases:—

**RULE 2.**—A man is guilty of an *injuria* who, without authority or excuse, either—

(a) Wittingly or unwittingly does any act,

- or makes any written or verbal statement, which infringes upon any absolute right of another person ;
- (b) Wittingly or unwittingly does any act which is forbidden by law ;
  - (c) Omits to do something which a reasonable man would do, or does something which a reasonable man would not do ;
  - (d) Makes any false statement, either written or verbal, to another, with intent to deceive ;
  - (e) Omits to make any statement with intent to deceive in cases in which there is a legal duty upon him to make such statement.

Roughly speaking, therefore, *injuriæ* proceed either from misdeeds, neglects or frauds.

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**Involuntary Injuriæ.** Where the act or omission not authorized by law is committed involuntarily, no action lies.

**RULE 3.**—No person is legally responsible for any act or omission not attributable to active or passive volition on his part.

I do not mean to say that a man who sins from ignorance, and not from malice, is thereby excused.



Far from it, for by reasonable inquiry he might set himself right; and, indeed, on grounds of public policy alone, apart from metaphysical considerations, it is obvious that it would be highly inconvenient and dangerous to admit any such doctrine. The above rule, differently put, means, in the language of an ancient justice, that "no man shall be excused of a trespass, unless it be judged utterly without his fault."

(1) A horse driven by the defendant was alarmed by the noise caused by a butcher's cart driven furiously along the street, and, becoming ungovernable, ran away and injured the plaintiff's horse. It was, however, held, that as the act was involuntary on the defendant's part, he was not liable (*Wakeman v. Robinson*, 1 Bing. 213; and see *Beckwith v. Shordike*, 4 Burr. 2092; and *Scott v. London Dock Co.*, 34 L. J., Ex. 220).

(2) Under the Metropolis Local Management Act (18 & 19 Vict. c. 120), a duty is imposed upon the vestry, of properly cleansing the sewers vested in them. Under the premises of the plaintiff was an old drain, which was one of the sewers vested in the vestry. This drain having become choked, the soil therefrom flowed into the cellars of the plaintiff and did damage.

In an action against the vestry, the jury found (*inter alia*) that the obstruction was unknown to the defendants, and could not by the exercise of reasonable care have been known to them. Held, that upon this finding the defendants were entitled to the verdict (*Hammond v. Vestry of St. Pauls*, L. R., 9 C. P. 316).

(3) On the defendant's land were artificial pools,

containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment was carried away by the pressure, and the water in the pools being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall was most excessive, and amounted to a *vis major*, or visitation of God. Under these circumstances, it was held, that no action was maintainable, because, as Bramwell, B., said, "the defendant had done nothing wrong; he had infringed no right. It was not the defendant who let loose the water and sent it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that if it were let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier would be liable; but that cannot be. Then why is the defendant liable, if some agent over which he has no control lets the water out? The defendant merely brought the water to a place, whence another agent let it loose, *but the act is that of an agent he*



cannot control" (*Nichols v. Marsland*, *L. R.*, 10 *Ex.* 255; affirmed, *L. R.*, 2 *Ex. Dir.* 1).

(4) The above case must be carefully distinguished from the well-known leading case of *Rylands v. Fletcher* (*L. R.*, 3 *H. L.* 330), the facts of which were as follows:—The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and employed competent persons to construct it, so that there was no question of negligence. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir, it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. It was contended on behalf of the defendant that there was no negligence on his part, and that if he were held liable, it would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously, whereas he contended that knowledge of possible mischief was of the very essence of the liability incurred by occasioning it. The House of Lords, however, held the defendant to be liable, on the ground that "a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must

keep it at his peril, and if he does not do so is *primâ facie* responsible for all the damage which is the natural consequence of its escape." It therefore appears that the act which was not authorized by law was *the allowing the water to escape*, and whether this was the result of negligence, or whether it was the result of a latent and undiscovered defect in the engineering works, was quite immaterial. The escape of the water was caused by something of which the defendant was *ignorant*, not by something altogether beyond his control or volition, like a visitation of providence. The distinction between *Rylands v. Fletcher* and *Nichols v. Marsland* is no doubt subtle, and somewhat difficult for the lay mind to grasp at first sight, but a little consideration will, I think, show that it entirely depends upon the rule of which I have made the two cases examples (see also *Hurdman v. N. E. R. Co., L. R., 3 C. P. Div. 168*).

(5) Again, where the defendant by mistake mowed the plaintiff's grass, he was held to be a trespasser, although he had committed the trespass quite unintentionally, and in ignorance that he was not upon his own land (*Baseley v. Clarkson, 3 Lev. 37*).

Sub-rule.—*The law presumes that an act or omission done or neglected under the influence of pressing danger, was done or neglected involuntarily.*

This doctrine would seem to be founded upon the maxim that self-preservation is the first law of nature, and that where it is a question whether one of two men shall suffer, each is justified in doing the best

that he can for himself. Indeed, so far has this doctrine been carried, that it is said, that if two shipwrecked persons are attempting to save themselves by means of a plank which is not sufficiently large to sustain them both, one of them is justified in pushing the other off. This however is an example rather appertaining to criminal than civil law.

(1) A person wrongfully threw a squib on to a stall, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and, finally exploding, blinded the plaintiff. The liability of the persons who threw it away from their stalls in self-defence was not the question before the court, but a dictum of Chief Justice De Grey is a good illustration of the sub-rule. He said, "It has been urged, that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*Scott v. Shepherd*, 2 W. Bl. 894). The first example of the first rule (*supra*) is another example of the above sub-rule.

**Unintentional Injuries.** Although, as we have seen, no act or omission can be said to be wrongful unless it is within the power of the person doing or omitting to abstain from doing or omitting to do it, and although, therefore, every wrongful act must in a certain sense be either actively or passively

intentional, yet it is no defence to an action that the wrongdoer did not intend to cause any *damage*.

RULE 4.—Every person is presumed to intend the probable consequence of every voluntary act or omission of his, not authorized by law.

Of course an intention to inflict an injury makes a tort very much more serious from a moral point of view, and, as we shall see hereafter, is an important factor in assessing the amount of damages to be awarded to the injured party; but nevertheless actual intention is not a necessary ingredient, being always irrebutably presumed.

(1) In the above-mentioned case of *Scott v. Shepherd*, the person who first started the squib was held liable for the loss of the plaintiff's eye, although it was proximately caused by the last person who removed it from his stall.

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt (*Indermaur v. Dames*, *L. R.*, 2 *C. P.* 311).

**Remoteness of Damage.** The rule, however, is subject to the following qualification:—

Sub-rule.—No action lies where the *injuria* and *damnum* are not usually found in sequence, unless it be shown that the defendant knew, or had reasonable means

*of knowing, that consequences, not usually resulting from the act, were, by reason of some existing cause, likely to intervene so as to cause damage to a third person.*

(1) The defendant, in breach of the Police Act (2 & 3 Vict. c. 47, s. 54), washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in an action brought in respect of this damage, Chief Justice Bovill said: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom;" but "where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. Can it then be said to have been the ordinary and probable consequence of the defendant's act that the

water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage (for which the defendant is not responsible), no damage would have been done." And accordingly judgment was given in favour of the defendant (*Sharp v. Powell, L. R., 7 C. P. 258*).

(2) But where water, which had trickled down from a waste-pipe at a railway station on to the platform, had become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured, the court held the defendants liable, on the ground, probably, that the non-removal of a *dangerous nuisance* like ice from their premises was the proximate cause of the injury (*Shepherd v. Mid. R. Co., cited by plaintiff arguendo, Sharp v. Powell, supra*).

(3) Again, a brig, by the negligence of those on board her, came into collision with a barque. In the collision the main rigging of the barque was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening of the same day the wind increased in violence, and eventually the barque was driven on shore and some of the crew were drowned. It was held, that as the loss of the masts was the proximate cause of the wreck, and as the loss of the masts was the immediate result of the collision, the loss of life was the result of the



collision (*The George and Richard*, L. R., 3 A. & E. 466).

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**Statutory Rights and Duties. RULE 5.—**

When a statute gives a right, or creates a duty, in favour of an individual or class of individuals, then unless it enforces the duty by a penalty recoverable by the *party aggrieved*, (as distinguished from a common informer,) any infringement of such right, or breach of such duty, will, if coupled with damage, be a tort remediable in the ordinary way.

(1) An illustration of this rule is given by the case of *Couch v. Steel* (3 E. & B. 402), the facts of which were shortly as follows:—By the statute 7 & 8 Vict. c. 112, s. 18, “every ship navigating between the United Kingdom and any place out of the same, shall have, and keep on board, a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages.” To enforce performance of this section a penalty is imposed upon those disobeying it.

The plaintiff, having suffered damage in consequence of the default of the defendant in not obeying this section, brought an action.

It was held, that the action would lie; because the statute had created a duty, and although it had given a remedy for the public wrong committed by its violation, viz., the penalty, yet it had not given any remedy to a private person suffering special

damage; and "the right to maintain an action for special damage resulting from a breach of public duty is not taken away, by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of a public duty, although it is competent for the plaintiff to sue for the penalty if first in the field" (*Beckford v. Hood*, 7 I. R. 627). In such cases, the penalty is cumulative upon the ordinary remedy by action; the one being a punishment for the breach of a public duty, the other a recompense for a private wrong (*Id.* 38).

(2) Water companies are, by Act of Parliament, obliged to keep their pipes to which fire plugs are attached constantly charged with water at a certain pressure, and are to allow all persons, at all times, to use the same for extinguishing fire, without compensation; and for neglect of this duty a penalty is imposed, recoverable by a common informer. On a demurrer to a declaration by which the plaintiff claimed damages against a water company for not keeping their pipes charged as required, whereby his premises were burnt down, it was held that the action would lie (*Atkinson v. Gateshead Waterworks Co.*, L. R., 6 Ex. 404).

**Statutory Remedy.** Sub-rule 1.—*But where the statute creating a new duty, or obligation, provides a mode of obtaining compensation for private special damage by means of a penalty recoverable by the party aggrieved, there is no other remedy,—as the remedy is then prescribed by the act (per Campbell, C. J., Couch v. Steel, sup.; Underhill v. Ellicombe, M'Cl. & Y. 455).*



**Where no Right created.** Sub-rule 2.—

*Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind is not entitled to maintain an action for damages in respect of such loss (Gorris v. Scott, L. R., 9 Ex. 125).*

(1) Thus, in the above case, the defendant, a ship-owner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard, by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869. It was however held, that the object of the statute and order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiffs could not recover.

(2) And so, where certain regulations were established by statute for the management of the pilchard fishery, and enforced by the imposition of penalties; it was held, that a fisherman who had lost his proper turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him, for the loss of a valuable capture of fish, which the latter had taken, through being in such wrong place; as the object of the statute was to regulate the fishery, and not to give any individual fisherman a right to any particular place (*Sterens v. Peacocks*, 11 Q. B. 741).

(3) But where, by 4 & 5 Vict. c. 45, s. 17, a penalty

is imposed upon unauthorized persons unlawfully importing books, reprinted abroad, upon which copy-right subsists, the remedy by action is not taken away from the authors; for there is a right created in their favour, and, therefore, the penalty is cumulative (*Novello v. Sudlow*, 12 C. B. 188).

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**Felonies.** RULE 6.—Where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy by action is suspended until the party inflicting the injury has been prosecuted (Cockburn, C. J., *Wells v. Abrahams*, L. R., 7 Q. B. 557).

But although this is the rule, it is extremely doubtful how it can be enforced. It is certainly no ground for the judge at the trial to direct a nonsuit (*Wells v. Abrahams*, *sup.*), and it is excessively doubtful whether it could be raised by plea, because “the effect of that would be to allow a party to set up his own criminality. But it may well be, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked, to stay the proceedings which would involve an undue use, probably an abuse, of the process of this court; in which case the court is always willing to interfere to prevent such abuse”

(per Cockburn, C. J., *ibid*). And in the same case, Blackburn, J., said, "I do not see how a plaintiff can be prevented from trying his action, unless the court, acting under its summary jurisdiction, interfere." . . . "From the time these cases were decided, there is no reported instance of the court having interfered to stop an action until we come to *Gimson v. Woodful* (2 C. & P. 41). That case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not afterwards bring an action to recover it from B., unless he had prosecuted A. But in *White v. Spettigue* (13 M. & W. 603) that was expressly overruled. The last case is *Wellock v. Constantine* (32 L. J., C. P. 285)." . . . "That case, I think, cannot be treated as an authority" . . . "to say that because it was for the interest of the public, the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous."

The principle to be gathered from this case, therefore, would seem to be, that although the rule exists, it is rarely, if ever, enforced; and that the only way of enforcing it, is by the summary jurisdiction of the court, interfering not at the instance of the defendant, but for the purposes of public justice, and to prevent abuse of its process.

It would seem that the rule does not apply to an action *in rem* (see the "*Princess Royal*," L. R., 3 A. & E. 41).

## CHAPTER II.

## OF QUASI TORTS.

**Arising ex Contractu.** Although a tort has been defined, as a wrong independent of contract, there is nevertheless a class of wrongs, which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu*, or *ex delicto*, may generally be brought at the pleasure of the party injured.

**RULE 7.**—Whenever there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort, or in contract (*Brown v. Boorman*, 11 *Cl. & F.* 44).

(1.) **Negligence of Professional Men.** Thus if an apothecary carelessly or unskilfully administer improper medicines to a patient, whereby such patient is injured, he may sue him either for the breach of his implied contract to use reasonable skill and care, or for tortious negligence, followed by the actual damage (*Scarl v. Prentice*, 8 *East*, 847).

(2.) **Waste.** So where a person having an estate for life or years commits waste, it is both a breach of the implied contract to deliver up the premises in as good a condition as when he entered upon them, and also an injury to the reversion, which is a violation of the reversioner's right, and therefore a tort.

**Privity necessary.** But as a tort founded upon contract can only properly arise out of an infringement of some duty created by the contract it is a well-established rule, that—

**RULE 8.**—Whenever a wrong is founded upon a contract, no one not a privy to the contract can sue in respect of such wrong (*Tollit v. Shenstone*, 5 M. & W. 289).

Thus a master cannot sue a railway company for loss of services, caused by his servant being injured by the company's negligence when being carried by them; for the injury in such a case arises out of the contract between the company and the servant, to which the master is no party (*Alton v. Mid. Ry. Co.*, 34 L. J., C. P. 292).

**When Privity unnecessary.** Sub-rule.—*But where there is a distinct tort to the plaintiff altogether separate and apart from the breach of contract to a third party, although connected with it, the plaintiff may maintain an action.*

(1) Thus in cases of fraud (as is hereafter mentioned) a man is responsible for the consequences of a breach of a warranty made by him to another, upon the faith of which a third person acts; provided that such false representation was made with the direct intent that it should be acted upon by such third person (*Barry v. Crosby*, 2 Johns. & H. 21).

(2) And so where a father bought a gun for the use of himself and his son, and the defendant sold it to him *for that purpose*, fraudulently representing it as sound, and it exploded and injured the son, it was held that he could maintain an action of tort, although not privy to the warranty (*Langridge v. Levy*, 4 M. & W. 333).

(3) So if a surgeon treat a child unskilfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin v. Sheppard*, 11 Price, 400).

(4) So "a stage-coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustain personal injury, is liable to him; for it is a misfeasance towards him if, after taking him as a passenger, the proprietor drives without due care" (*Longmeid v. Holliday*, 6 Ec. 767, per Parke, B.).

(5) And so where a servant travelling with his master, who took his ticket and paid for it, lost his portmanteau through the railway company's negligence, he was held entitled to sue the company (*Marshall v. York, &c. R. Co.*, 21 L. J., C. P. 34).

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**Misfeasance.** There is a class of contracts which are particularly nearly allied to torts. Such are, gratuitously undertaken duties. Such duties are not contracts in one sense, namely, that being without consideration the contractor is not liable for their nonfeasance, *i. e.* for omitting to perform them. But on the other hand, if he once commences to perform them, the contract then becomes choate as it were, by virtue of the following rule—

RULE 9. — The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in its performance (*Coggs v. Bernard*, 1 Sm. L. Ca. 177, 6th ed.).

Thus in the above case, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and in doing so one of the casks got staved through his gross negligence. Upon these facts, it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet having once entered upon the performance of it, he thence became liable for all misfeasance.

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**Bailments.** Such is a brief account of the law upon this head:

In some works, injuries to goods whilst in the keeping of carriers and innkeepers are described as



torts; in others as breaches of contract; but however actions in respect of them may be framed, they are in substance *ex contractu*, being for non-performance of the contract of bailment, and not for a tort independent of contract (*Rosc.* 539; 2 *Bl. Com.* 451; *Legge v. Tucker*, 26 *L. J.*, *Ex.* 71). I shall therefore not treat of them in this work.



## CHAPTER. III.

OF THE LIABILITY OF MASTERS FOR THE TORTS OF  
THEIR SERVANTS.

**General Liability.** It is a well-known legal maxim, that *qui facit per alium, facit per se*, whence the following rule is easily deduced—

RULE 10.—A person who puts another in his place, to do a class of acts in his absence, is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what is done is not done from any caprice of the servant, but in the course of the employment (*Bayley v. Manchester, Sheff. & Lincoln. R. Co., L. R., 7 C. P. 415*).

(1) Thus if a servant drive his master's carriage over a bystander; or if a gamekeeper employed to kill game, fire at a hare and kill a bystander; or if a workman employed in building, negligently drop a stone from the scaffold, and so hurt a bystander; the person injured may claim reparation from the master; because the master is bound to guarantee the public against all damage arising from the

wrongful or careless acts of himself, or of his servants when acting within the scope of their employment (*Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Ca. 266).

**Acts done outside the Employment.** Sub-  
rule 1.—*A master is not responsible for the wrongful act of his servant, unless the act was an act done by the servant in the course of his employment.*

(1) It was the course of employment of the carman of the defendant, who was a brewer, with the defendant's horse and cart to deliver beer to the customers, and on his return collect empty casks, for each of which he received a penny. The carman having, without the defendant's permission, taken out the horse and cart *for a purpose entirely of his own*, on his way back collected some empty casks, and while thus returning the plaintiff's cab was injured by the carman's negligent driving. Under these circumstances, it was held that the defendant was not liable, and Lindley, J., said, "The question is, whether under these circumstances, the servant was acting in the course of his employment. In my judgment he was not. It is certain that the servant did not go out in the course of the employment. Does it alter the case, that whilst coming back, he picks up the casks of a customer? I think it does not. He was returning on a purpose of his own, and he did not convert his own private occupation into the employment of his master simply by picking up the casks of a customer. The conclusion, therefore, to which I come is, that the servant was not engaged in his master's business in any sense,

and therefore our judgment must be for the defendant" (*Rayner v. Mitchell*, 25 W. R. 632).

(2) So, where a master intrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that the servant was not acting within the scope of his employment; for he had started upon a new and entirely independent journey which had nothing to do with his employment (*Storey v. Ashton*, L. R., 4 Q. B. 476). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not be considered as taking him out of his master's employment (*Mitchell v. Crossweller*, 22 L. J., C. P. 100; and see *Whiteley v. Pepper*, L. R., 2 Q. B. D. 276).

(3) So, where a servant wantonly, and not in the execution of his master's orders, struck the plaintiff's horses, and so produced an accident, the master was held not to be liable (*Croft v. Alison*, 4 B. & A. 590).

**Wilful act.** Sub-rule 2.—*A master is responsible for the manner in which his servant does an act for the master's benefit, which act is within the scope of his probable authority, even though such manner was contrary to the master's orders; but a master is not responsible for an act of his servant which is in itself, and not merely in the manner of doing it, illegal.*

(1) In *Limpus v. London General Omnibus Co.* (11 W. R. 149; 7 L. T., N. S. 245), the driver of an omnibus plying between P. and K., whilst plying between those places, wilfully, and contrary to express

orders from his master, pulled across the road, in order to obstruct the progress of the plaintiff's omnibus. In an action of negligence, it was held that if the act of driving across to obstruct the plaintiffs' omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was responsible; that his liability depended upon the conduct of the servant in the course of his employment, and that the orders given to him not to obstruct were immaterial. And Willes, J., said, "It is perfectly well known that there is substantially no remedy whatever against the driver of an omnibus, and therefore it is necessary that for what he does in the course of his master's service the master should answer. There should be some person who is capable of paying damages, and who may be sued by people who are injured by improper driving. It appears to me that this was a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty towards his master and out of the course of his employment, a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven before the omnibus of the plaintiffs. Now, of course, one may say that it is no part of the duty of a servant to obstruct another omnibus; and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants in the course of

his employment; and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability. I hold it to be perfectly immaterial that the master directed the servant not to do the act which he did. As well might it be said that if a master employing a servant told him that he should never break the law, he may thus absolve himself from all liability for any act of his servant, though in the course of his employment. . . . The proper question for the jury to determine is, whether what was done was in the course of the employment, and for the benefit of the master." Blackburn, J., also, quoting and approving the charge of the learned judge who tried the case, said, "If the jury came to the conclusion that he did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy—who may be supposed to be the rival omnibus—that would be out of the course of his employment. That saves all possible objections."

(2) The case of *Poulton v. London and South-Western R. Co.* (*L. R.*, 2 *Q. B.* 534) seems, at first sight, to be inconsistent with the above case. There, a station-master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff, and detained him in custody until it was ascertained by telegraph that all was right. The railway company had no power whatever to arrest a person for nonpayment of carriage, and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in

the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station-master; and Blackburn, J., said: "In *Limpus v. General Omnibus Co.*, where the question was, whether or not the direction of my brother Martin was erroneous, there was a difference of opinion. The late Mr. Justice Wightman thought it was; that the learned judge had gone too far to make the company liable: the other judges thought that there had been no misdirection, and that the act done by the driver was within the scope of his authority, though no doubt it was a wrongful and improper act, and, therefore, that his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act." And Mellor, J., said: "If the station-master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns."



(3) In *Goff v. Great Northern R. Co.* (3 E. & E. 672), on the other hand, the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger for nonpayment of his fare; and the court accordingly held, that the policemen who were employed, and the station-master, must be assumed to be authorized to take people into custody whom they believed to be committing the act, and that if there was a mistake, it was a mistake within the scope of their authority.

(4) So, again, in *Bayley v. Manchester, Sheffield and Lincoln R. Co.* (L. R., 7 C. P. 415), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but nevertheless, the court considered that it was within the probable scope of a porter's authority to gently remove any person in a wrong carriage, and as the porter had exercised his probable authority violently, they held that the company was responsible (see also *Seymour v. Greenwood*, 6 H. & N. 359).

**Doctrine of Ratification.** The preceding remarks have reference only to cases in which the

injury has been occasioned either by the negligence of the servant in the course of his employment, or by his wilful act, done under such circumstances as make it probable that he was authorized to commit it, upon proper occasion, but had used such authority injudiciously or carelessly. But there is a third class which differs from both of these, viz. where a servant commits a tort whilst not acting in pursuance of his master's employment, but which the master subsequently adopts.

RULE 11.—A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and whether it be for his detriment or his advantage, to the same extent as the same act done by his previous authority (*Wilson v. Tumman*, 6 M. & Gr. 242).

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori equiparatur*," and is equally applicable to torts and to contracts. It should be observed that the act *must* have been done for the use or for the benefit of the principal (4 Inst. 317; *Wilson v. Barker*, 4 B. & Ad. 614; and judgment, Dallas, C. J., *Hull v. Pickersgill*, 1 B. & B. 286).

**Meaning of "Servant."** The term "servant" does not exclusively apply to menials.



RULE 12.—When a man is hired by the master, either personally, or by those who are intrusted by the master with the hiring of servants, to do the business required of him, the master will be responsible for any torts committed by him within the scope of such business (*Laugher v. Pointer*, 5 B. & C. 547); but a contractor, sub-contractor, or other person exercising an independent employment, is not a servant within the meaning of the rule (*Rapson v. Cubitt*, 9 M. & W. 710; *Pearson v. Cox*, L. R. 2 C. P. D. 369).

(1) The first part of this rule applies not only to domestic servants but to clerks, managers, agents, and in short all whom the master appoints to do any work, and over whom he retains any control or right of control, even though they be not in the immediate employ, or under the immediate superintendence of the master. Thus “if a man is owner of a ship, he himself appoints the sailing master, and desires him to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management of his ship; and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself” (*Laugher v. Pointer*, *sup.*, per Littledale, J.).

(2) A contractor employed by navigation commissioners, in the course of executing the works flooded the plaintiff's land by improperly, and without

authority, introducing water into a drain insufficiently made by himself. Here the contractor, and not the commissioners, was held liable (*Allen v. Howard*, 7 Q. B. 960).

(3) So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C.; a passenger injured by the negligent construction of the scaffold could only sue C., and not A., B., or the company (*Knight v. Gex*, 5 Ex. 721).

(4) So where a butcher bought a bullock, and hired a licensed drover to drive it to his shop; and the drover instead of so doing employed a boy for the purpose; it was held that the butcher was not liable for the injurious consequences caused by the boy's negligence, as the relation of master and servant did not exist between them (*Milligan v. Wedge*, 12 A. & E. 737).

(5) So if the owner of a carriage hire horses from a job master, who at the same time provides a driver, the job master is liable for accidents caused by the driver's negligence, for he is his servant, and not that of the owner of the carriage (*Quarman v. Burnett*, 6 M. & W. 499; and *quà* the public a similar principle applies to cab proprietors and cab drivers (*Venables v. Smith*, L. R., 2 Q. B. D. 279).

**Liability of Employer for Contractor's Torts.** Sub-rule 1.—*A person employing a contractor will be liable for the contractor's wrongful acts, if either (a) the employer retains his control over the con-*

tractor, and personally interferes and makes himself a party to the act which occasions the damage; or (b) where the thing contracted to be done is itself unlawful; or (c) where a legal duty is incumbent upon the employer, and the contractor either omits or imperfectly performs such duty.

(1) Thus where the defendant employed a contractor to make a drain, and the contractor's man left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, and it did not appear that the contractor had undertaken to remove it; it was held that the defendant was liable (*Burgess v. Gray*, 1 C. B. 578).

(2) A company, unauthorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an injuria or wrongful act (*Ellis v. Sheffield Gas Consumers' Co.*, 23 L. J., Q. B. 42).

(3) So where the defendants were authorized by an act of parliament to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and where the plaintiff suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable, and could not excuse themselves by throwing the blame on their contractor.

**Temporary Employment by Another.**

Sub-rule 2.—*Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts committed during such temporary employment by another.*

(1) Thus in *Rourke v. White Moss Coal Co.* (L. R., 2 C. P. D. 205), the defendants had contracted with W. to sink a shaft for them at so much a yard, W. to provide all necessary labour, the defendants providing steam power and machinery, and two engineers, *to be under the control of W.* The plaintiff, one of W.'s workmen, was injured by the negligence of L., one of the defendants' engineers; but it was held that the company were not liable for this injury, on the ground, that although L. was their general servant, yet at the time of the injury he was not actually employed in doing their work, and was under the immediate control of W., to whom he had been lent by them, and whose servant, therefore, he must be considered to have been.

**Unauthorized Delegation by a Servant.**

RULE 13.—A master is not, in general, liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties, and between whom and the master the relation of master and servant does not exist (*submitted*).

(1) Thus it is apprehended that if a master wrote to his groom and ordered him to take the carriage to

such a place, and the groom, instead of taking the carriage himself, employed A. to do it for him without having ever had any authority from the master to intrust A. with the carriage, and A. so carelessly drove the carriage as to injure B., no action would lie against the master, for the master never hired the groom for the purpose of employing others to do his work, and therefore, in intrusting the carriage to A., he would be acting beyond the scope of his employment, and beyond his probable authority.

(2) But if, on the other hand, the groom had taken A. with him, and had handed the reins to him, it is submitted that the master would be liable, because the handing of the reins to another whilst he was in the act of performing his duty would be a default in the performance of that duty, and not a complete retirement from its performance (see per Lord Abinger, *Boothe v. Mister*, 7 C. & P. 66, and *Joel v. Morrison*, 6 C. & P. 503).

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Such is a brief outline of the law relating to the responsibility of masters to third parties for the torts of their servants; but the learning on the subject is of so technical a character, and the distinctions as to when a servant is, and when not, acting within the scope of his employment, or even whether he be a servant at all, are so very refined, and the authorities are so conflicting, that a legal training is often necessary in order that the difference may be distinguished. I shall therefore content myself with the foregoing

general rules (which are believed to be accurate so far as they go), leaving to other and larger works on the law of master and servant the task of quoting the numerous cases on the subject and commenting upon the very subtle distinctions between them. I would particularly recommend the chapter on the master's liability contained in Mr. Manley Smith's excellent and exhaustive treatise on Masters and Servants, as a very complete exposition of the law on this subject, and would also call the student's attention to the reports of the following cases, namely:—*Storey v. Ashton*, L. R., 4 Q. B. 476; *Whatman v. Pearson*, L. R., 3 C. P. 422 (very conflicting); *Lord Bolingbroke v. Local Board of Swindon*, L. R., 9 C. P. 575; *Murray v. Currie*, L. R., 6 C. P. 24; *McManus v. Cricket*, 1 East, 106; *Gregory v. Piper*, 9 B. & C. 591; *Mitchell v. Crasweller*, 13 C. B. 237; *Francis v. Cockerill*, L. R., 5 Q. B. 184; *Lyons v. Marten*, 8 A. & E. 512; *Overton v. Freeman*, 11 C. B. 867; *Cuthbertson v. Parsons*, 21 L. J., C. P. 165; *Welfare v. L. B. & S. C. R. Co*, L. R., 4 Q. B. 693; and *Wilson v. Merry*, L. R., 1 H. L. 326.

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**Liability of Master for Injuries caused by Servant to Fellow-servant.** RULE 14.—A master is not liable to his servant for damage resulting from the negligence of his fellow-servant in the course of their common employment, unless the servant causing the



injury was incompetent to discharge his duty, or the servant injured was not at the time acting in his master's employment.

(1) Thus where a workman at the top of a building carelessly let fall a heavy substance upon a fellow workman at the bottom, the master was held not to be responsible, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggett v. Fox*, 25 *L. J.*, *Ex.* 118).

(2) So in *Hall v. Johnson* (34 *L. J.*, *Ex.* 222), the plaintiff was a miner in defendants' employ, as was also an underlooker whose duty it was to see that as the mine was excavated the roof should be propped up. This he neglected to do, whereby a stone fell and injured the plaintiff; but it was held that this attached no liability to the defendants, as no proof was given that they did not use due care in selecting the underlooker for his post.

**Meaning of Common Employment.** Sub-rule:—*It is not necessary to the application of the above rule, that the servant causing, and the servant sustaining, the injury, should both be engaged in precisely the same, or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages* (*Morgan v. Vale of Neath R. Co.*, *L. R.*, 1 *Q. B.* 149; *Allen v. New Gas Co.*, *L. R.*, 1 *Ex. D.* 251).

(1) Thus the driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape ; the person who lets down into or draws up from a pit, or the miners working therein, and the miners themselves; all these are fellow labourers within the meaning of the doctrine (*Bartonshill Coal Co. v. Reid*, 4 Jur., N. S. 767). The real test seems to be, whether they are engaged in the same pursuit.

(2) In *Morgan v. Vale of Neath R. Co.* (L. R., 1 Q. B. 149), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenters' work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held, however, that he could not recover against the company, on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment (and see *Lovell v. Howell*, L. R., 1 C. P. D. 161).

(3) And again, in *Tunney v. Mid. R. Co.* (L. R., 1 C. P. 291), the plaintiff was employed by a railway company as a labourer, to assist in loading what is called "a pick-up train," with materials left by



platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. The plaintiff accordingly sued the company, but the court held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.

(4) So, again, in *Feltham v. England* (*L. R.*, 2 *Q. B.* 33), the defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood, supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on to the engine, the piers gave

way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff.

(5) So where two railway companies, A. and B., have a joint staff of signalmen, and one of them gets injured through the negligence of the private engine driver of company A., such company will not be liable; because, although the injured man is the servant of A. and B., and the engine-driver is the servant of A. only, yet they were engaged in a common pursuit so far as company A. were concerned, although the signalman was also engaged in a further and additional pursuit on behalf of B. (see *Swainson v. N. E. R. Co.*, 25 *W. R.* 676). But where one of two companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton v. G. W. R. Co.*, *L. R.*, 2 *Ex.* 30; and see *Turner v. G. E. R. Co.*, 33 *L. T.* 431).

**Negligence of Master.** RULE 15.—A master is bound to take reasonable precautions to insure his servant's safety; and if, through the absence of such reasonable pre-

cautions, or through the breach of some duty incumbent on the master, or through the personal negligence of the master, the servant is injured, the master will be responsible (*Ormond v. Holland*, *E. B. & E.* 102; *Ashwin v. Stanwin*, 30 *L. J.*, *Q. B.* 183).

(1) Thus in *Mellors v. Shaw* (30 *L. J.*, *Q. B.* 333), the defendants were owners of a coal mine, and the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them; by the defendants' negligence the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition. By reason of this, and also by reason of no sufficient or proper apparatus having been provided by the defendants to protect their miners from the unsafe state of the shaft, a stone fell from the side of the shaft on to the plaintiff's head, and he was dangerously wounded. One of the defendants was manager of the mine, and it was worked under his personal superintendence, and the plaintiff was not aware of the state of the shaft. On this state of facts the defendants were held liable.

(2) So where a builder knowingly erects a scaffolding of unsound wood, and one of his workmen is injured in consequence, he will be liable (see *Roberts v. Smith*, 2 *H. & N.* 213).

(3) So where a master ordered a servant to take a bag of corn up a ladder which the master knew,

and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams v. Clough*, 3 II. & N. 258).

**Servant's knowledge of Danger.** Sub-rule.—*Where a servant is injured by an instrument which he is himself using in the course of his employment, and of the nature of which he is as much aware as his master, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, recover against the master, unless there is evidence that the injury arose through the personal negligence of the master, notwithstanding that such instrument was not the safest for effecting the object in view.*

(1) Therefore where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the master's orders (*Dyner v. Leach*, 26 L. J., Ex. 221; and see also *Senior v. Ward*, 1 E. & E. 385).

(2) A hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding and close to it. A cart in passing struck against the hoarding, and knocked down the machine against the plaintiff, a workman in the defendant's employ. The plaintiff

had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved. It was here held that there was no evidence to go to the jury of the master's liability (*Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648); but see *Holms v. Worthington*, 2 F. & F. 533, where Mr. Justice Willes seems to have thought that acquiescence by the workman in the reasonable expectation of the known defect being made good did not excuse the master. But this was a *nisi prius* case, and never came before the court in banco.

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**Volunteers.** RULE 16.—If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against the master, unless he were guilty of personal negligence or breach of duty, or unless the servants were not competent persons.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. The latter cannot therefore be fairly called upon to recompense him for the result of his officiousness.

Thus where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed the volunteer, and the servants of the company were of competent skill, and the company did not authorize the negligence, it was held that the company were not liable (*Degg v. M. R. Co.*, 1 H. & N. 773; *Potter v. Faulkner*, 1 B. & S. 800).

*Exception.* Where a person aids the servants of another, with such other's consent or acquiescence, not as a mere volunteer but for the purpose of expediting some business of his own, he is not considered to be in the position of a servant *pro tempore*.

Thus where the plaintiff sent a heifer by the defendants' railway to P., and on its arrival, there being only two porters to shunt the truck, the plaintiff, in order to save delay, assisted in shunting the truck, and was injured by the negligence of one of the defendants' engine-drivers, and there was evidence that the station-master assented to his aiding in the shunting, it was held that he was entitled to recover damages (*Wright v. L. & N. W. R. Co.*, L. R., 1 Q. B. D. 252).



## CHAPTER IV.

## OF THE LIMITATION OF ACTIONS EX DELICTO.

**Reasons for Limitation.** I have so far treated of the wrongs independent, or quasi independent, of contract, of which the law takes cognizance; and I have shown how the law gives a remedy whenever it holds any act to be wrongful, in accordance with the maxim "*ubi jus ibi remedium est.*"

But although there is always a remedy, yet for the sake of the peace of the kingdom a man is not allowed to enforce his remedy at his own leisure, and after a long interval, in the course of which evidence may have been entirely swept away, which if produced might prove the defendant's innocence.

For this and other reasons, various statutes have been from time to time passed, which confine the right of action within certain periods after its commencement—periods which, as they differ in different actions, will be more particularly mentioned in the course of the second part of this work. At this stage, I propose to examine only such rules as apply to the limitation of all actions of tort.

**Commencement of Period. RULE 17.—**

When a statute limits the period within which an action is to be brought for an act done or omitted, if the cause of action is a single act, or one which amounts to a trespass, the action must be brought within the prescribed period after the actual doing of the thing complained of. But if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury (*Backhouse v. Bonomi*, 9 H. L. C. 503).

The meaning of this rule is, that where the tort is the wrongful infringement of a right, then as that constitutes *per se* a tort, so the period of limitation commences to run immediately from the date of the infringement. But on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

(1) Thus where A. owned houses built upon land contiguous to land of B., C., and D.; and E., being the owner of the mines under the land of all these persons, so worked the mines that the lands of B. sank, and after more than six years' interval (the period of limitation in actions on the case), their sinking caused an injury to A.'s houses: Held, that A.'s



right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself (*Backhouse v. Bonomi, sup.*).

(2) In an action for wrongful conversion of goods, (which is an injury to a right) the facts were as follows:—A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years and died. Upon A.'s death it was claimed by these friends, and adversely by the widow on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the friends had claimed the furniture, for the tort was the wrongful conversion of the goods, which had only taken place when the widow refused to give them up (*Edrurdes v. Clay*, 28 *Beav.* 145).

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**Disability.** RULE 18.—*Contra non valentem agere nulla currit præscriptio.*

(*Where a person is under disability, the statute does not run.*)

Thus where persons who would otherwise have the right to sue, are under certain disabilities, (as, for instance, coverture (in case of a woman), idioey, or insanity,) the period of limitation does not commence to run until such disabilities have ceased (see 21 *Jac.* 1, c. 16, s. 7; 3 & 4 *Will.* 4, c. 27, s. 16).

*Exception.*—No actions of ejectment shall be brought, and no distress or entry be made to recover land or rent, but within forty years next after the right of action shall have accrued, notwithstanding that the person entitled to sue may be under some disability (3 & 4 Will. 4, c. 27, s. 17); and after the 1st January, 1879, the time will be further reduced to thirty years (37 & 38 Vict. c. 57, s. 5).

**Disability subsequent to commencement of period no Bar.** Sub-rule.—*Whenever the statute has once begun to run it continues to do so* (*Rhodes v. Smethurst*, 4 M. & W. 42; *Lafond v. Ruddock*, 13 C. B. 819).

Therefore where the plaintiff is under no disability at the time the right of action accrued to him, but subsequently becomes under disability, and continues so until the expiration of the period of limitation, his right of action is barred; for the statute having once begun to run continues to do so.

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**Continuing Torts.** RULE 19.—Where the tort is continuing, the right of action is also continuing (*Whitehouse v. Fellowes*, 30 L. J., C. P. 305).

Thus where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem* is a new imprisonment, and therefore the period of limitation commences to run from the last and not the first day of the imprisonment (*Hardy v. Ryle*, 9 B. & C. 608).

## CHAPTER V.

## OF THE MEASURE OF DAMAGES IN ACTIONS OF TORT.

THE principles which govern the measure of damages in actions of tort are very loose, and, indeed, as Mr. Mayne, in his excellent treatise, has pointed out, there are many cases of tort in which no measure can be given. It will be at once apparent, however, that, putting aside circumstances of aggravation or mitigation, the compensation to be awarded in respect of an injury to property is capable of being far more accurately calculated than in respect of injury to person or reputation; and, therefore, to some extent the principles of law are different in these two classes of cases, as will be seen from the following rules.

**Damages for Personal Injury. RULE 20.**  
—There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, but the damages must be excessive and outrageous to warrant a new trial (*Huckle v. Money*, 2 Wils. 205; *Corkery v. Hickson*, Ir. R., 10 C. L. 175).

(1) *False Imprisonment*.—Thus where some working men were unlawfully imprisoned for six hours only, being in the meantime well fed and cared for, and the jury nevertheless awarded 300*l.* to each

of them, the court refused to set the verdict aside, on the ground that it seemed to them probable that the jury considered the importance of the right of personal liberty rather than the position of the plaintiffs.

(2) *Seduction*. And so in actions for seduction, "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (per *Ld. Eldon*, *Bedford v. M'Koul*, 3 *Esp.* 120).

(3) *Assault*. So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge v. Wade*, 8 *Wils.* 18).

(4) *Defamation*. So for defamation, the damages are almost wholly in the discretion of the jury (*Kelly v. Sherlock*, *L. R.*, 1 *Q. B.* 686), and the court will seldom interfere with their verdict.

*Exceptions*.—The court will interfere with the ver-

diet, if it appear that the jury assessed the damages under a mistake or ill-feeling, or if they give the plaintiff more than he is entitled to, according to his own showing, or where the smallness of the amount shows that the jury have made a compromise, and, instead of deciding the issues, have agreed to find for the plaintiff for nominal damages only (*Hambleton v. Vere*, 2 Wms. Saund. 170; *Britton v. S. W. R. Co.*, 27 L. J., Ex. 355; *Fulroy v. Stanford*, L. R., 10 Q. B. 54).

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**Damages for Injuries to Property.** It is extremely difficult to lay down any rules with regard even to this branch of the subject, where it might be considered that some principles of estimation would apply, for the jury are allowed a much greater latitude than in questions of contract. However it may be laid down as generally true that—

**RULE 21.**—The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act.

(1) *Injury to Horse.* Thus in the case of injury to a horse through the defendant's negligence; it has been held, that the measure of damages is the keep of the horse at the farrier's, the amount of the

farrier's bill, and the difference between the prior and subsequent value of the horse (*Jones v. Boyce*, 1 Stark. 493; and see *Wilson v. Newport Dock Co.*, L. R., 1 Ex. 187).

(2) *Conversion*. So in the conversion of chattels, the full market value of the chattel at the date of the conversion is, *in the absence of special damage*, the true measure. Thus, where the plaintiff purchased champagne, lying at the defendant's wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave England, and the defendants wrongfully refused to deliver up the wine, and converted it to their own use, it was held, in an action of trover, that although the defendants had no knowledge of the sale, or of the purposes for which the plaintiff required delivery of the champagne, yet the plaintiff was entitled as damages to the price at which he had sold it (*France v. Gaudet*, L. R., 6 Q. B. 199).

(3) *Trespass*. So where coal has been taken by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*In re United Merthyr Coll. Co.*, L. R., 15 Eq. 46).

(4) *Infringement of Patent*. And so the patentee



of an invention applicable to part of a machine, who is himself a manufacturer, but who has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, can only claim from an infringer of his patent the ordinary royalty, and cannot claim in addition a manufacturing profit (*Penn v. Jack*, *L. R.*, 5 *Eq.* 81).

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### Consequential Damages. RULE 22.—

Where any special damages have naturally, and in sequence, resulted from the tort, they may be recovered.

The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

(1) *Loss of Business.* If, through the wilful or negligent conduct of another, one should receive corporal injury, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered. The most usual instances of this are to be found in actions against railway companies.

(2) *Medical Expenses.* So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon v. Bell*, 1 *Stark.* 289; and see *Spark v. Heslop*, 28 *L. J.*, *Q. B.* 197).

(3) *Loss of Property.* The plaintiff was travelling

with other passengers in the carriage of a railway company, and on the tickets being collected, there was found to be a ticket short, and the plaintiff was wrongly charged by the collector with being the defaulter, and on his refusing to pay, was removed by the officers of the company, without unnecessary violence; it was held, in an action for assault, that the loss of a pair of race-glasses, which the plaintiff had left behind him in the carriage when he was removed, and which were not proved to have come into the possession of any of the company's servants, was not such a natural consequence of the assault as to be recoverable (*Glover v. L. & S. W. R. Co.*, *L. R.*, 3 *Q. B.* 25; and see also as to remoteness *Sanders v. Stuart*, *L. R.*, 1 *C. P. D.* 326).

(4) *Lord Campbell's Act*. The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased (*Franklin v. S. E. R. Co.*, 3 *H. & N.* 211).

The jury cannot, in such cases, take into consideration the grief, mourning and funeral expenses to which the survivors were put. And this seems reasonable, for in the ordinary course of nature the deceased would have died sooner or later, and the grief, mourning and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake v. Mid. R. Co.*, 21 *L. J.*, *Q. B.* 233; *Dalton v. S. E. R. Co.*, 27 *L. J.*, *C. P.* 227).



(5) *Injury to Trade*. So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory v. Williams*, 1 C. & K. 568).

(6) *Hiring Substitute*. In cases of wrongful conversion, if the owner of the chattel has been obliged to hire another in its place, the expense to which he has been put is recoverable (*Ad. 403*).

(7) *Trespass*. Where the defendant was in charge of the plaintiff's house, and having one day lost the key, he effected an entrance through a window by means of a ladder, and showed some strangers through the house, it was held to be a trespass, for he was only authorized to enter in the ordinary way; and therefore, when some short time afterwards the house was entered through the same window by thieves following his example, and many things stolen, it was held to be the consequence of the defendant's wrongful entry, and that he was liable for the loss of the things stolen (*Ancaster v. Milling*, 2 D. & R. 714). The writer, however, entertains much doubt whether this case would be followed in the present day, as the alleged damage cannot (with great submission to the learned judges who decided the case) be said to have been the natural result of the trespass.

(8) *Inflection*. A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free

from infectious disease when he knew that it was not, and the plaintiff having placed the cow with five others, they caught the disease and died; it was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*Mullet v. Mason*, *L. R.*, 1 *C. P.* 559).

(9) In *Collins v. The Middle Level Commissioners* (*L. R.*, 5 *C. P.* 279) the facts were as follows: By a drainage act the Commissioners were to construct a cut with proper walls, gates and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry the drainage from the lands on the east to the west of the cut, *and to keep the same at all times open*. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank flooded the adjoining lands. The plaintiff and other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, and so let the waters through on to the plaintiff's lands to a much greater extent. It was held, that the Commissioners were liable for the whole of the damage, as the natural result of their negligence.

(10) *Having been obliged to pay Damages to a Third Party*. So, where a landlord, upon his tenant

giving notice to quit, entered into a contract with a new tenant. Upon the expiration of the notice, the first tenant refused to quit, and the new tenant not being able to enter in consequence brought an action against the landlord for breach of contract. It was held, that the landlord might recover in an action against the tenant the costs and damages to which he had been put in the action against him; for they were the natural and ordinary result of the defendant's wrong (*Bramley v. Chesterton*, 2 C. B., N. S. 605; and see *Tindal v. Bell*, 11 M. & W. 228).

### **Certain prospective Damages recoverable.**

*Sub-rule.*—*The jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of the defendant; for the damages when given are taken to include all the hurtful consequences arising out of the wrongful act, unknown as well as known (Ad. 586—991; and see Lamb v. Walker, L. R., 3 Q. B. D. 389).*

Best, C. J. (in *Richardson v. Mellish*, 2 Bing. 240), says, "When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—'you shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.'" A corollary to this sub-rule is that several actions cannot be brought in respect of the same injury. Therefore where a bodily injury

at first appeared slight, and small damages were awarded; but subsequently it became a very serious injury: it was held that another action would not lie, for the action having been once brought, all damages arising out of the wrong were satisfied by the award in the action (*Fetter v. Beale*, 1 *Ld. Raym.* 339—692).

**Continuing Torts.** *Exception.*—But if the tort be a continuing tort, the principle does not apply; for here a fresh cause of action arises *de die in diem*. Thus in a continuing trespass, or nuisance, if the defendant does not cease to commit the trespass, or nuisance, after the first action, he may be sued until he does.

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**Aggravation and Mitigation.** RULE 23.  
—The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis v. N. W. R. Co.*, 7 *W. R.* 105).

(1) *Seduction under Guise of Courtship.* In seduction, if the defendant have committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person.

"The jury did right in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (Wilmot, C. J., in *Tullidge v. Wade*, 3 Wils. 18).

(2) On the other hand, the previous loose or immoral character of the party seduced, is ground for mitigation. The using of immodest language for instance, or submitting herself to the defendant under circumstances of extreme indelicacy (*Id.* 909).

(3) *Plea of Truth in Defamation.* In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick v. Foulkes*, 12 M. & W. 508).

(4) *Plaintiff's Bad Character in Defamation.* Evidence of the plaintiff's *general bad character* has been allowed in mitigation of damages in cases of slander (*Jones v. Sterens*, 11 Pr. 265); but it is considered very doubtful whether this case would be followed at the present day.

(5) *Plaintiff's irritating Conduct in Defamation.* In *Kelly v. Sharlock* (L. R., 1 Q. B. 686), the action was brought in respect of a series of gross

and offensive libels contained in the defendant's newspaper. It appeared, however, that the first libel originated in the plaintiff having preached, and published in the local papers, two sermons reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew as their mayor, and the plaintiff had, soon after the libels had commenced, alluded, in a letter to another paper, to the defendant's paper as "the dregs of provincial journalism," and he had also delivered from the pulpit, and published, a statement to the effect that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault of which the plaintiff had been convicted. The jury having returned a verdict for a farthing damages, the court refused to interfere with the verdict on the ground of its inadequacy, intimating that although on account of the grossness and repetition of the libels the verdict might well have been for larger damages, yet it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to, and that the court ought not to interfere.

(6) *Imprisonment on False Charge of Felony.* In false imprisonment and assault, if the imprisonment has been upon a false charge of felony, where no felony has been committed, or no reasonable ground for suspecting the plaintiff, this will be matter of aggravation (*Ad.* 585).

(7) *Battery in consequence of Insult.* But if an



assault and battery have taken place in consequence of insulting language on the part of the plaintiff, this will be ground for mitigating the damages (*Thomas v. Powell*, 7 C. & P. 807).

(8) *Insolent Trespass.* Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for 500*l.* damages, the court refused to interfere, Chief Justice Gibbs saying, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (in *Merest v. Harvey*, 5 Taunt. 441).

(9) *Wrongful Seizure.* And so where the defendant wrongfully seizes another's chattels, and exercises dominion over them; substantial damages will be awarded for the invasion of the right of ownership (*Baylis v. Fisher*, 7 Bing. 153).

(10) *Causing Suspicion of Insolvency.* And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an execution, it was held that exemplary damages might be given (*Brewer v. Dew*, 11 M. & W. 629).

(11) *Return of Goods.* But where the defen-

dant has returned the goods in the course of the action, and they have been received unconditionally by the plaintiff, merely nominal damages will be recoverable; unless the goods have been injured, or some special damage has been suffered (*Ad. 363*).

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**Where Plaintiff is only Bailee. RULE 24.**  
—Where the plaintiff is merely the possessory, but not the real owner, he may, as against a third party, recover the entire value of the property; but as against the real owner, only the value of his limited interest (*Heydon and Smith's case*, 13 Co. 68).

And it seems therefore, that a *jus tertii* is not provable in reduction of damages, unless indeed the actual possession of the whole of the property was not in the plaintiff; as where the owner of one sixteenth of a ship attempted to get damages for the whole value of it, he was not allowed to do so (*Dockwray v. Dickenson*, *Skin.* 640).

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**Presumption of Damage. RULE 25.**—If a person who has wrongfully converted property, refuses to produce it, it shall be pre-



sumed as against him to be of the best description (*Armory v. Delamirie*, 1 Sm. L. Ca. 315).

(1) Thus in the above case, where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages upon the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia presumuntur contra spoliatorem*.

(2) So where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer v. Cradock*, 12 L. J., C. P. 166).

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**Damages in Actions of Tort founded upon Contract.** RULE 26.—The damages in actions of tort founded upon contract, must be estimated in the same way as they are estimated in breach of contract; for a man cannot, by merely changing the form of his action, put himself in a better position (see *Chinery v. Viall*, 5 H. & N. 295; *Johnson v. Stear*, 33 L. J., C. P. 130).

Therefore since in breaches of contract, the damages are limited to injuries which may reasonably be presumed to have been foreseen by both parties at the time of contracting, a man cannot sue for extraordinary, though consequential, damages (*Hadley v. Barendale*, 9 *Ex.* 354).

## CHAPTER VI.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF  
TORTS.

**Definition.** An injunction is a writ remedial, issuing by order of the Court of Appeal, or the High Court of Justice, or any division or judge of either of them, restraining the commission or continuance of some act of the defendant.

**Interlocutory or perpetual.** Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction granted summarily on a motion founded on affidavit, and before the facts in issue have been formally tried and determined. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

**Injuries remediable by Injunction.** RULE 27.—Wherever a legal right in property exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least not without the necessity of a multiplicity of

actions for that purpose. But an injunction will not be granted where the injury is trivial in amount, or where the court in its discretion considers that damages should alone be given (see 21 & 22 Vict. c. 27).

(1) Thus where substantial damages would be, or have been, recovered for injury done to land or the herbage thereon by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance, for otherwise the plaintiff would have to bring continual actions (*Tipping v. St. Helens' Smelting Co.*, *L. R.*, 1 Ch. 66).

(2) And so where a railway company for the construction of their works erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*Fenwick v. East London R. Co.*, *L. R.*, 20 Eq. 544).

(3) So where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises, an injunction will be granted *if the deprivation of light is such as would support a claim for substantial damages*; for, as was said by Sir W. Page Wood, V.-C., in *Dent v. Auction Mart Co.* (*L. R.*, 2 Eq. 246), "Having arrived at this conclusion with regard to the remedy

which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this, that where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this court will interpose, and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without an act of parliament for that purpose." Sir G. Jessel, M.R., commenting upon the above passage in *Aynsley v. Glover* (*L. R.*, 18 *Eq.* 552), says: "It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule now is,—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently,—that wherever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20*l.* is substantial damages), can be recovered at law, there the injunction ought to follow in equity, generally, not universally, because I have something to add upon that subject." His lordship then, commenting upon the power given to him of awarding damages in substitution for an injunction, proceeded as follows: "It must be for the court to decide, upon consideration, to what cases the enactment (21 & 22 Vict. c. 27) should be held to apply. In the case of

*The Carriers' Company v. Corbet* (2 Dr. & Sm. 355), we have an instance in which a judge has said that the act ought to apply in some cases. I had one before me, in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any judge will ever do so, to lay down a rule which, so to say, will tie the hands of the court. The discretion being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word ‘extort,’ but—to obtain a very large sum of money from a defendant, merely because the plaintiff has a legal right to an injunction. I think the enactment was meant, in some sense or another, to prevent that course being successfully adopted. But there may be some other special cases to which the act may be safely applied, and I do not intend to lay down any rule upon the subject. If I had found by the evidence that there was in this case a clear instance of very slight damage to the plaintiffs—that is, some 20*l.*, or 30*l.*, or 40*l.*, but still very slight—I should be disposed to hold that that was a case in which this court would decline to interfere by injunction, having regard to

the new power conferred upon me by Lord Cairns' Act to substitute damages for it" (and see also *Smith v. Smith*, *L. R.*, 20 *Eq.* 505).

(4) Where there is a *mere trespass*, the court will not interfere, because the proper remedy is by an action for damages, or an action of ejectment; but if in addition to the trespass, the trespasser is actually working the destruction of the estate, as by cutting down the timber or working a mine on it, an injunction will be granted (see *Drewry on Injunctions*, 184 *et seq.*; and *Joyce on Injunctions*, 131).

(5) Where the sewage of a town was carried from a brook which, passing through a man's land, fed a lake also on such land, and the sewage thus discharged had for several years fouled the water of the lake, so that from being pure drinking water it gradually became quite unfit for drinking, an injunction was granted (*Goldsmid v. Tunbridge Wells Improvement Co.*, *L. R.*, 1 *Eq.* 161).

(6) Again, deprivation of lateral or subjacent support, in cases where a jury would give considerable damages, is sufficient ground for an injunction.

(7) So, infringements of trade marks, copyright, and patent right, are peculiarly remediable by injunction; for not only are they continuing wrongs to proprietary rights, but damages never could properly compensate the persons whose rights are invaded.

(8) On the other hand, there is no injunction to restrain the publication of a libel (*Gee v. Pritchard*, 2 *Sw.* 402; *Clark v. Freeman*, 11 *B.* 112), for it does not concern property, and property is the subject-



matter of the jurisdiction. It is, however, apprehended that slander of title might be restrained.

(9) The courts have held, that the writer of private letters has such a qualified property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (*Drew. Inj.* 208; *Pope v. Curl*, 2 *At.* 342). And that the party written to has such a qualified right of property in them as will entitle him, or his personal representatives, to restrain their publication by a stranger, unless such right is displaced by some personal equity, or by grounds of public policy (*Drew. Inj.* 309; *Granard v. Dunkin*, 1 *B. & Beat.* 207; *Percival v. Phipps*, 2 *V. & B.* 19).

**Threatened Injury.** RULE 28.—The court will not in general interfere until an actual tort has been committed; but it may, by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual tort has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance (*Kerr, Inj.* 339).

(1) So where a man threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere before any actual damage or infringement of any right has actually taken place, if the circumstances are such as to enable it to form an opinion as to the illegality of the acts complained of,



and the irreparable injury which will ensue (*Palmer v. Paul*, 2 L. J., Ch. 154; *Elliott v. N. E. R. Co.*, 10 H. L. Cas. 333). But if the injury is only problematical, according as other circumstances may or may not arise, or if there is no pressing need for an injunction, the court will not grant it until a tort has actually been committed (*Kerr*, Inj. 339).

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**Public Convenience does not justify the Continuance of a Tort.** RULE 29.—It is no ground for refusing an injunction that it will, if granted, do an injury to the public, except where the legislature has *expressly* authorized the act complained of.

(1) Thus in the case of *The Attorney-General v. Birmingham Corporation* (4 K. & J. 528), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, they could not do so on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations (see also *Spokes v. The Banbury Board of Health*, L. R., 1 Eq. 42; and *Goldsmid v. Tunbridge Wells Improvement Co.*, *sup.*).

**Mandatory Injunctions.** RULE 30.—Where an injunction is asked, not merely

prohibiting an act, but ordering some act to be done, it in general requires a stronger case to be made out, than where a mere prohibition is asked for, especially where the injunction is interlocutory (*Deere v. Guest*, 1 *M. & C.* 516; *Durrell v. Pritchard*, *L. R.*, 1 *Ch.* 250; *Clark v. Clark*, *L. R.*, 1 *Ch.* 16).

(1) Thus where a man has actually built a house which interferes with his neighbour's ancient lights, the court will not order him to take it down, except in cases in which extreme, or at all events very serious damage, would ensue if its interference were withheld.

(2) And so where an injunction was asked, ordering the defendants to pull down some new buildings, on two grounds, namely, 1st, that a right of way was obstructed by the new buildings; and, 2ndly, that the new buildings obstructed the light and air: it was held that no injunction ought to be granted, because, as was said by the Lord Justice Turner, "as to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, I think that the diminution of light and air to the plaintiff's houses is not such as would warrant us in granting the relief which is asked" (*Durrell v. Pritchard*, *sup.*).

**Delay.** RULE 31.—A person who has not shown due diligence in applying to the court for relief, will in general be debarred from obtaining an interlocutory injunction; but he will not be thereby debarred from obtaining an injunction at the hearing of the cause, unless his delay has been of such long duration as wholly to have deprived him of the right which he originally had (per Lord Langdale in *Gordon v. Cheltenham R. Co.*, 5 B. 233).



## PART II.

RULES RELATING TO PARTICULAR TORTS.



## CHAPTER I.

## OF DEFAMATION.

**Oral or Written.** Defamation may be either oral or written. In the former case it is called slander,—in the latter, libel.

**Definitions.** Libel, in its legal sense, may be defined as a false and malicious defamation of character expressed in writing, print, picture, or the like, tending to injure the reputation of another, and whereby that other is exposed to public ridicule, hatred, or contempt (Broom, 731).

The definition of slander is similar to that of libel, with the exception that the defamatory matter must be spoken and not written.

**RULE 1.**—In order to sustain an action for defamation, one of the two following state of facts must exist, namely:—

- (a) A false and disparaging statement expressed in writing, or print, published maliciously by the defendant of the plaintiff;
- (b) A false and disparaging verbal statement spoken and published mali-



ciously by the defendant of the plaintiff, whereby (except in certain cases hereinafter mentioned) actual damage has been caused to the plaintiff.

**I.—Falsity.** The words must be false, for truth is a good plea to an action for defamation (*Watkin v. Hall, L. R.*, 3 Q. B. 400; *Macpherson v. Daniels*, 10 B. & C. 272; *Gourley v. Plimsoll, L. R.*, 8 C. P. 362).

In making it necessary to the success of an action for defamation that the defamatory statement should be false, our law follows the civil law, in which it was a principle that “*eum qui nocentium infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium, nota esse oportet et expedit.*”

**II.—Disparagement.** The words, writing, or picture, must be disparaging to be actionable (see *Sheaban v. Ahearne, Ir. Rep.*, 9 C. L. 412).

Sub-rule 1.—*Disparaging words are such as impute conduct or qualities tending to disparage or degrade the plaintiff* (*Digby v. Thompson*, 4 B. & A. 821); *or to expose him to contempt, ridicule, or public hatred, or to prejudice his private character, or credit* (*Gray v. Gray*, 34 L. J., C. P. 45); *or to cause him to be feared or avoided* (*Ianson v. Stuart*, 1 T. R. 748; *Walker v. Brogden*, 19 C. B., N. S. 165).

Thus describing another as an infernal villain is a disparaging statement sufficient to maintain an

action (*Bell v. Stone*, 1 B. & P. 331); and so is an imputation of insanity (*Morgan v. Lingden*, 8 L. T., N. S. 800); or insolvency, or impecuniousness (*Met. Saloon Omnibus Co. v. Hawkins*, 28 L. J., Ex. 201; *Eaton v. Johns*, 1 Dougl., N. S. 612); or of gross misconduct (*Clement v. Chiris*, 9 B. & C. 176); or of cheating at dice (*Grerville v. Chapman*, 5 Q. B. 744; or of ingratitude (*Cor v. Lee*, L. R., 4 Ex. 284).

So reflections on the professional and commercial conduct of another are defamatory; as to say of a physician, that he is a quack; and even to advertise pills as prepared by him (contrary to the fact) would probably be a libel (*Clark v. Freeman*, 11 Bear. 117). So, also, calling a newspaper proprietor "a libellous journalist," is defamatory (*Wakeley v. Cooke*, 4 Ex. 518).

The imputation must however in such cases be a charge of professional misconduct, and not a mere imputation of unworthy habits, or bad taste (*Clay v. Roberts*, 9 Jur., N. S. 580).

III.—**Construction of Words.** Sub-rule 2. — *Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject* (per Pollock, C. B., in *Hankinson v. Bilby*, 16 M. & W. 442).

Thus words, which in themselves are innocent and inoffensive, may become libellous or slanderous when used in an ironical manner, and in such a way that no reasonable person could be expected to construe them in their ordinary sense.

**IV.—Publication.** Both written and spoken defamation must have been published in order to constitute an actionable wrong.

Sub-rule 3.—*The making known the libel or slander to any person other than the object of such libel or slander is publication in its legal sense.*

“Though, in common parlance, that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is indisputably in law a publishing” (*Rex v. Burdett*, 4 B. & Ald. 143).

In civil actions it is immaterial—so far as the right to recover *some* damages is concerned—whether the libel was published intentionally, or only by accident, or through the negligence of the defendant (*Fox v. Broderick*, 14 Ir. C. L. Rep. 453; see also *Harrison v. Bush*, 5 E. & B. 344).

It is for the jury to find whether the facts, on which it is endeavoured to prove publication, are true; but for the court to decide whether those facts constitute a publication.

**V.—Malice.** Express or implied malice must exist in actions of defamation, but generally it is implied.

Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another (per Campbell, C. J., 9 Cl. & F. 321).

Sub-rule 4.—*In an action for defamation, the existence of express malice is only a matter for inquiry, when the words complained of were spoken on a justifi-*

able occasion (*Hooper v. Gruscott*, 2 Bing. N. C. 457; *Watkin v. Hall*, *supra*; *Speill v. Maule*, L. R., 3 Ex. 232).

The meaning of this is, that where a statement, writing, or picture, is false and defamatory, and was not published upon such a lawful occasion as to rebut the presumption of malice, the law will conclude it to be malicious (*Baylis v. Lawrence*, 11 A. & E. 920).

There are, however, cases in which it is necessary to show express malice on the part of the defendant, that is to say:—(1) Where the communication is said to be privileged (and with these I shall have to deal at greater length subsequently); and (2) in slander of title, that is to say, where the slander consists in falsely impeaching a man's right to land or goods (*Wren v. Weild*, L. R., 4 Q. B. 730).

**VI.—Damages.** In actions of slander (save in the cases hereinafter mentioned), but not of libel, it is necessary to prove damages, and unless the plaintiff can do so he cannot succeed.

Sub-rule 5.—*In oral defamation, as in other torts, where damages must be proved, the loss complained of must be such as "might fairly and reasonably have been anticipated and feared would follow from the speaking of the words"* (*Lynch v. Knight*, 9 H. of L. C. 517).

The rule laid down by Lord Ellenborough on this point was, that the special damage must be the legal and natural consequence of the words spoken, and, consequently, that it is not sufficient to sustain an action of slander to prove a mere wrongful act of a third party induced by the slander, such as that he had

dismissed the plaintiff from his employment, before the end of the term for which they had contracted (*Vicars v. Wilcocks*, 2 Sm. L. C. 534). The decision in this case seems to have been arrived at on two grounds; (1) that the plaintiff having been unlawfully dismissed had a right of action against his master, and that, therefore, he ought not to be allowed a second action against the slanderer, lest he should recover double damages; and (2) that the act complained of being a wrongful act could not possibly be considered the *legal* and natural consequence of the defamation. The first of these dicta has now ceased to be law, and the cases of *Green v. Button* (2 C. M. & Ry. 171), and, more particularly, *Lumley v. Gye* (2 E. & B. 216) have completely overruled such an objection. In respect to the rule that the damages must be the legal and natural consequence of the slander, the judgment of Lord Wensleydale, in *Lynch v. Knight* (*sup.*), throws considerable doubt thereon, and should be carefully read. His lordship thus proceeds:—"I am much influenced by the able reasoning of Mr. Justice Christian (one of the judges in the court below). I strongly incline to agree with him, that to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, as we might think ought to follow. . . . In the case of *Vicars v. Wilcocks*, I must say that

the rules laid down by Lord Ellenborough are too restrictive. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond as a consequence of words spoken; but, I own, I can conceive that, when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime."

*Examples of Actual Damage.*—(1) Words were spoken imputing unchastity to a woman, and by reason thereof she was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature: Held, that such a result was not such special damage as would render the words actionable (*Roberts v. Roberts*, 33 L. J., Q. B. 249).

(2) Action by husband and wife for slander, imputing incontinency to the wife, alleging that, by reason thereof the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her: Held, that the declaration showed no



cause of action (*Allsopp v. Allsopp*, 5 *Hurls. & Norm.* 534).

(3) Where the wife, in consequence of words imputing want of chastity to her, ceased to receive the hospitality of divers friends, and especially of her husband, it was held that such a loss was the reasonable and natural consequence of such slander (*Davies v. Solomon*, *L. R.*, 7 *Q. B.* 112).

There is a custom in the City of London courts enabling a woman whose chastity has been slandered, to maintain an action, though she can prove no special damage (3 *Steph. Com.* 379).

**Imputation of Crime, Unfitness for Society and Misconduct in Business.** There are certain exceptions to the rule that verbal slander must have caused actual damage in order to be actionable. In fact some slanders import such defamation as must be naturally prejudicial, and therefore in such cases the law presumes a *damnum*.

*Exception* (1). A false oral imputation made against another, of the commission of an indictable offence, is a sufficient *damnum* of itself (*Roucliff v. Edmonds*, 7 *M. & W.* 12).

Thus the words "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable (*Jones v. Herne*, 2 *Wils.* 89). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo of the

murder of D.] are, after the verdict of not guilty, a sufficient charge of murder to support an action (*Peake v. Oldham*, 2 *W. Bl.* 960). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (per Ellenborough in *Thompson v. Barnard*, 1 *Camp.* 48; and per Kenyon, *Christie v. Cowell*, *Peake*, 4).

The allegation, too, must be a direct charge of crime. Thus saying of another, that he had forsworn himself, is not actionable, without showing that the words had reference to some judicial inquiry (*Holt v. Scholefield*, 6 *T. R.* 691).

*Exception (2).* False words tending to cause exclusion from society are actionable per se.

Thus to allege the *present* possession of an infectious disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (see *Carslake v. Mapplodrum*, 2 *T. R.* 473; *Bloodworth v. Gray*, 7 *M. & G.* 334).

*Exception (3).* Words imputing to a man misconduct in, or want of some necessary qualification for, his office or trade, are actionable per se; although the office or trade is not one of which the court can take judicial notice (*Foulger v. Newcomb*, *L. R.*, 2 *Ex.* 327).

Thus words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable per se (*Irvine v. Brandicood*, 2 *H. & C.* 960; 33 *L. J.*, *Ex.* 257).



So where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallwey v. Marshall*, 23 *L. J.*, *Ex.* 78).

So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southce v. Denning*, 17 *L. J.*, *Ex.* 151; 1 *Ex.* 196).

Or of an attorney that "he deserves to be struck off the roll" (*Phillips v. Jansen*, 2 *Esp.* 624). But it is not ground for an action to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession.

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**Repeating Slander.** RULE 2.—Whenever an action will lie for slander or libel, it is of no consequence that the defendant was not the originator, but merely a repeater, or printer, and publisher of it; and if the damage arise simply from the repetition, the originator will not be liable (*Parkins v. Scott*, 1 *Hurl. & Coll.* 153; *Watkin v. Hall*, *L. R.*, 3 *Q. B.* 396; *McPherson v. Daniels*, 10 *B. & C.* 273); except (1) where the originator had authorized the repetition (*Kendillon v. Maltby*, *Car. & M.* 402); and (2) where the words are spoken to a person under a moral duty or obligation to communicate them to a third

(*Derry v. Handley*, 16 L. T., N. S., Q. B. 263).

(1) In that case, Cockburn, C. J., observes, "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person, as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters, the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communicator is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

The reason of this rule is that an unauthorized repetition of words spoken is not the necessary result or consequence of the original utterance of such words.

(2) But where A. slandered B. in C.'s hearing, and C. without authority repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorized repetition and not of the original statement (*Ward v. Weeks*, 4 M. & P. 808).

(3) *Printing Slander*. So the printing and publishing by a third party of oral slander (not *per se* actionable), renders the person who prints, or writes and publishes the slander, and all aiding or

assisting him, liable to an action, although the originator, who merely *spoke* the slander, will not be liable (*McGregor v. Thwaites*, 3 B. & C. 35).

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter, for "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (per Best, J., *Crespigny v. Wellesley*, 5 Bing. 403).

**Newspaper Proprietors.** Sub-rule 1.—*In an action for libel against the proprietor or editor of any newspaper or other periodical, the defendant may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such or some other publication a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And upon filing such plea, the defendant may pay a sum into court by way of amends* (6 & 7 Vict. c. 96, s. 2).

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**Privileged Communication.** RULE 3.—Where a communication is made *bonâ fide* upon any subject-matter in which the party

communicating has an interest, or in reference to which he has a duty, either public or private, either legal, moral, or social, such communication, if made to a person having a corresponding interest or duty, rebuts the inference of malice, and is privileged. When such is the case the onus of *proving* malice is thrown upon the plaintiff (*Ad. on Torts*, 770; *Harrison v. Bush*, 5 *E. & B.* 344; *Wright v. Woodgate*, 2 *C., M. & R.* 573; *Somerville v. Hawkins*, 10 *C. B.* 583; *Lawless v. Anglo-Egyptian Cotton Co.*, *L. R.*, 4 *Q. B.* 262; *Spill v. Maule*, *L. R.*, 4 *Ex.* 232; *Daukins v. Lord Paulet*, *L. R.*, 5 *Q. B.* 94; *Davies v. Sneed*, *L. R.*, 5 *Q. B.* 608; *Henwood v. Harrison*, *L. R.*, 7 *C. P.* 606; *Laughton v. Bishop of Sodor and Man*, *ibid.* 608; *Hart v. Gumpach*, *L. R.*, 4 *P. C.* 439; *Kelly v. Tintling*, *L. R.*, 1 *Q. B.* 699; *Dickeson v. Hilliard*, *L. R.*, 9 *Ex.* 79).

This rule would seem to apply even when the person to whom the communication is made has not, in fact, any corresponding interest or duty, if the plaintiff honestly thought he had, and there were good and reasonable grounds for him so to think (*Harrison v. Bush*, *supra*).

Where in an action for libel the defendant insists that the publication is privileged, it is for the judge to rule whether the occasion creates a privilege. If

the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances or from the language of the libel itself, the question of express malice should be left to the jury (*Cook v. Wildes*, 5 E. & B. 328).

(1) *Parliamentary Proceedings*. Speeches in parliament are privileged (*Stockdale v. Hansard*, 9 A. & E. 1); and a faithful report in a public newspaper of a debate in either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason v. Walter*, L. R., 4 Q. B. 73).

(2) *Judicial Proceedings*. Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott v. Stansfield*, L. R., 3 Ex. 220); but those of counsel only if relevant and according to instructions. But fair comments on the opponent's case are allowable (*Hodgson v. Scarlett*, 1 B. & Al. 232). Attorneys acting as advocates have a like privilege (*Mackay v. Ford*, 29 L. J., Ex. 404). Statements of witnesses can never be the subject of an action (*Daubins v. Lord Rokesby*, L. R., 8 Q. B. 261). If false, the remedy is by indictment (*Henderson v. Broomhead*, 28 L. J., Ex. 360). Fair reports of trials are also privileged (*Lewis v. Levy*, 27 L. J., Q. B. 282); but the report of an application to a justice not sitting judicially is not privileged. An application to a magistrate for advice, for instance, is not privileged (*McGregor v. Thwaites*, 3 B. & C. 24).

(3) *Confidential Advice*. So advice given in confidence at the request of another, and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*Taylor v. Hawkins*, 16 Q. B. 308; *Manby v. Witt*, 25 L. J., C. P. 294; 18 C. B. 544); but it seems doubtful whether a voluntary statement is equally privileged (see *Corhead v. Richards*, 15 L. J., C. P. 278; and *Fryer v. Kinnersley*, 33 L. J., C. P. 96).

Thus the character of a servant given to a person requesting it, is privileged (*Gardiner v. Slade*, 18 L. J., Q. B. 313; *Pattison v. Jones*, 8 B. & C. 578).

The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*Cowles v. Polls*, 34 L. J., Q. B. 247).

But imputations circulated freely against another in order to injure him in his calling, however bona fide made, are not privileged. Thus a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin v. Fowler*, 9 Ex. 615).

The unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*Williamson v. Freer*, L. R., 9 C. P. 393).

(4) *Criticism*. Lastly: Fair and just criticisms of literary publications and works of art are privileged, provided the private character of the author or artist is not attacked (*McLeod v. Whately*, 3 Car. & P. 311; *Carr v. Hood*, 1 Camp. 355; *Thompson v. Shackell*, M. & M. 187).

Tradesmen's advertisements are within the mean-

ing of literary publications (*Paris v. Levy*, 30 *L. J.*, *C. P.* 1).

So, too, fair criticism is allowed upon the public life of public men, or men filling public offices; such as the conduct of public worship by clergymen (*Kelly v. Tintling*, *L. R.*, 1 *Q. B.* 699): provided such criticism does not touch upon their private lives (*Gathercole v. Miall*, 15 *M. & W.* 319).

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**Limitation.** RULE 4.—All actions for oral slander must be commenced within two years next after the cause of action arose, and all actions for libel within six years.

Of course this rule is subject to the general ones particularly set out in the first part of this work.

It may be mentioned that where the tort consists of the actual damage caused by an oral slander, the period begins to run from the date of the damage, and not that of the slander (*Saunders v. Edwards*, 1 *Sid.* 95).



## CHAPTER II.

### OF MALICIOUS PROSECUTION.

AN action may be maintained for maliciously instituting criminal proceedings against another (*Churchill v. Siggers*, 3 Ell. & Bl. 937), or for maliciously causing him to be adjudicated a bankrupt (*Farley v. Danks*, 4 E. & B. 499; *Johnson v. Emerson*, L. R., 6 Ex. 329).

**RULE 5.**—In order to support an action for malicious prosecution the plaintiff must show (1) malice, and (2) want of probable cause on the part of the defendant, (3) that the former proceedings were determined in his favour, and that (4) he has suffered damage by reason of such prosecution.

**I.—Malice.** Malice, as I explained in the last chapter, is either express or implied.

**Sub-rule 1.**—*In an action for malicious prosecution malice is generally implied upon proof of absence of reasonable and probable cause for instituting the criminal proceedings* (*Johnstone v. Sutton*, 1 T. R. 544).

(1) Thus where the defendant at the time of the prosecution of the plaintiff showed that he had a

consciousness of the innocence of the accused, it was held evidence of malice.

(2) So too where one is assaulted justifiably, and he institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong, and had no just cause of complaint, malice may be presumed (*Hinton v. Heather*, 14 *M. & W.* 131).

(3) So too it may be presumed, if it be shown that the defendant *knew* that the plaintiff against whom he had charged a theft, took the goods under an erroneous belief that he had a legal right to do so (*Huntley v. Simpson*, 27 *L. J., Ex.* 134).

(4) So where the prosecutor of another says that he is prosecuting him in order to stop his mouth, it is evidence that he knew him to be innocent, and therefore that the prosecution was malicious (*Heslop v. Chapman*, per Maule, J., 23 *L. J., Q. B.* 49).

The fact of malice is a question for the jury (*Payne v. Rivan*, 9 *W. R.* 693).

**Subsequent Malice.** Sub-rule 2.—*A prosecution, though in the outset unmalicious, may become malicious if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds malo animo in the prosecution* (per Cockburn, C. J., *Fitz John v. MacKinder*, 30 *L. J., C. P.* 264).

And where a person has not instituted, but only adopts and continues proceedings, the same principle applies (*Weston v. Beeman*, 27 *L. J., Ex.* 57).

Thus where, through the defendant's perjury, the judge of a county court, believing the plaintiff to

have perjured himself, committed him for trial, and bound over the defendant to prosecute him, which he did, but unsuccessfully; and after the criminal trial the plaintiff brought an action for malicious prosecution; it was held that the action was maintainable, because, although the defendant had not initiated the proceedings, yet there was no reason why he should have followed them up; for he might have discharged his recognizance by appearing and telling the truth (*Fitz John v. MacKinder*, 30 L. J., C. P. 264).

**II.—Want of probable Cause.** Although, as we have seen, malice may be implied from want of probable cause, in no case can the want of probable cause be implied from the mere existence of malice (*Johnstone v. Sutton*, 1 T. R. 544). In *Taylor v. Williams* (6 Bing. 186), Tindal, C. J., remarks, "Malice alone is not sufficient, because a person actuated by the plainest malice may, nevertheless, have a justifiable reason for prosecution."

The existence of reasonable and probable cause is a question of law for the judge, the jury having ascertained the facts, if the facts are in dispute (per Kelly, C. B., *Perryman v. Lister*, L. R., 3 Ex. 202).

What is reasonable and probable cause "is a mere question of opinion depending entirely upon the view which the judges may happen to take of the circumstances in each particular case" (per Kelly, C. B., in *Perryman v. Lister*, *sup.*). "There must be a reasonable cause, such as would operate on the mind

of a discreet man; there must be also a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him" (*Broad v. Ham*, 5 Bing. N. C. 725).

*Counsel's Opinion.* A man cannot shield himself from the results of a malicious prosecution, on the ground that it was instituted under the advice of counsel. "It would be a most pernicious practice," remarks Heath, J., "if we were to introduce the principle that a man, by obtaining the opinion of a counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution" (5 *Taunton*, 283).

**III.—The former Proceedings must have been determined in the Plaintiff's favour.** It is necessary to show that the proceeding alleged to have been instituted maliciously, and without reasonable or probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*Baseby v. Mathews and Wife*, L. R., 2 C. P. 684).

This rule applies equally to the case where the plaintiff has been summarily convicted under a statute which gives no power of appeal (*Baseby v. Mathews*, *sup.*).

**IV.—Damage.** "In order to support an action for malicious prosecution or suit, it is necessary to show some damage resulting to the present plaintiff from

the former proceeding against him. This may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*Mayne's Treatise on Damages*, p. 345).

In this case, as in slander, the damages must be the reasonable and probable cause of the malicious prosecution, and not too remote.

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**Non-liability of Complainant for Acts of Magistrate.** RULE 6.—If a person *boni fide* makes a complaint to a magistrate, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who complained to the magistrate is not responsible for the magistrate's error (*Wyatt v. White*, 29 *L. J.*, *Ex.* 193). But if there be no reasonable and probable cause for suspecting that a felony has been committed, and the defendant makes a specific charge of felony, it is otherwise.

Thus, if one, without reasonable and probable cause,

causes a search warrant to issue against the plaintiff, he is liable to an action; but if he merely goes before a magistrate and *bonâ fide* puts before him reasonable grounds of suspicion, and the magistrate thereupon, in the exercise of his discretion, issues the warrant, no action lies (*Cooper v. Booth*, 3 *Esp.* 144).

## CHAPTER III.

## OF FALSE IMPRISONMENT AND MALICIOUS ARREST.

**What constitutes Imprisonment.** RULE 7.  
 —Where a total restraint for some period, however short, is put upon the liberty of another without sufficient legal authority, an action lies for the infringement of the right (*Bird v. Jones*, 7 Q. B. 743).

**Moral Restraint.** Imprisonment does not imply incarceration, but any restraint by force or show of authority; as, for instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger v. Hill*, 4 Bing. N. C. 212).

But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction, as by preventing the plaintiff from exercising his right of way over a bridge, is no imprisonment, for no restraint is thereby put upon his liberty (*Bird v. Jones*, *sup.*).

The rules which apply to imprisonments by private persons, and those which apply to imprisonments by



judges and other magistrates, are necessarily different.

It will be therefore more convenient to consider them separately and in order.

### SECTION 1.

*Of Imprisonments by Private Persons and Constables.*

**General Immunity.** RULE 8.—No person can in general arrest or imprison another without a legal and legally executed warrant.

*Exceptions.* (1) *Bail*.—A person who is bail for another may always arrest and render him up in his own discharge (*Exp. Lyne*, 3 *Stark*. 132).

(2) *Felons*.—A treason or felony having *been actually committed*, a private person may arrest one *reasonably* suspected by him; but the suspicion must not be mere surmise (*Beckwith v. Philby*, 6 *B. & C.* 635).

A constable may, however, arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer, and even though it should turn out eventually that no felony has been committed he will not be liable (*Marsh v. Loader*, 14 *C. B.*, *N. S.* 535; *Griffin v. Coleman*, 28 *L. J.*, *Ex.* 134).

The suspicion, however, must be a reasonable one, or the constable will be liable. Thus where one told the defendant, a constable, that a year before he had had his harness stolen, and that he now saw

it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg v. Ward*, 27 *L. J.*, *Ex.* 443).

Where one man charges another with having committed a felony, and a constable at and by his direction takes that other into custody, the party making the charge, and not the constable, is liable should the charge turn out false (*Davis v. Russell*, 2 *M. & P.* 607).

"It would be most mischievous," Lord Mansfield remarks, "that the officer should be bound first to try, and at his peril exercise, his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*Griffin v. Colman*, 4 *H. & N.* 265).

(3) *Breakers of Peace*.—A private person may and ought to arrest one committing, or about to commit, a breach of the peace, but not if the affray be over and not likely to recur (*Timothy v. Simpson*, 1 *Cr.*, *M. & R.* 757).

But it seems that a constable may arrest even after the affray (so that it be immediately after), in order to take the offender before a magistrate (*R. v. Light*, 27 *L. J.*, *M. C.* 1).

(4) *Night Offenders*.—Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11).

(5) *Malicious Injuries*.—The owner of property, his servant, or a constable, may arrest and take before a magistrate any one *found committing* malicious injury to such property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(6) *Offering Goods for Pawn*.—A private person to whom goods are offered for sale or pawn may, if he has reasonable ground for suspecting that an offence against the Larceny Amendment Act (24 & 25 Vict. c. 96) has been committed with respect to them, arrest the person offering them, and take him and the property before a magistrate.

(7) *Vagrants*.—Any person may arrest and take before a magistrate one *found committing* an act of vagrancy (5 Geo. 4, c. 83).

N.B. Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which I must refer to the 4th section of the Act.

In other cases, to justify an arrest, the warrant, writ or order of some competent court must be obtained, and the person arresting must have it with him at the time, ready to produce if demanded (*Gilliard v. Loxton*, 31 L. J., M. C. 123).

Under the 4th, 5th and 7th exceptions, it is no excuse to prove commission of the offence immediately

before the arrest, for the arrest must be made *in the course of the commission* of the offence (see *Simmon v. Milligan*, 2 C. B. 533).

*Particular Exceptions.*—In London, the owner of property may arrest any one *found* committing any indictable offence, or misdemeanor in respect to it, punishable upon summary conviction.

Most Railway Acts, too, give power to officers of the company to detain unknown offenders against the Act.

Officers in the army may arrest a deserter, and ship masters have special powers of imprisoning crew and passengers.

Special powers too are frequently given to the police of certain towns and cities by their local acts.

## SECTION 2.

### *Of Imprisonment by Judicial Officers.*

RULE 9.—No judicial officer, invested with authority to imprison, is liable to an action for a wrongful imprisonment, unless he acted beyond his jurisdiction (*Doswall v. Impey*, 1 B. & C. 169; *Kemp v. Neville*, 10 C. B., N. S. 523): not even though he imprisons the plaintiff maliciously (*Miller v. Hope and Shaw*, Sc. App. Cas. 125; *Reon v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569. See also *Darwins v. Paulet*, L. R., 5 Q. B. 94).

(1) In the case of *Scott v. Stansfield* (*L. R.*, 3 *Ex.* 220), which, though an action of slander, will very well repay a careful perusal, Kelly, C. B., remarks, "It is essential, in all courts, that the judges, who are appointed to administer the law, should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection, or benefit, of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury, whether a matter, on which he had commented judicially, was or was not relevant to the case before him ?

"Again, if a question arose as to the *bona fides* of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions, such as that of good faith or relevancy, raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to determination. It is impossible to over-estimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action

as this can under any circumstances be maintainable" (a).

(2) Where a court has jurisdiction of a matter before it, but acts erroneously, the parties suing, the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (*Comyn, Dig. tit. County Court*, 8; *Houlden v. Smith*, 14 Q. B. 841; *Wingate v. Waite*, 6 M. & W. 746).

(3) So where a magistrate acts without those circumstances which must concur to give him jurisdiction he will be liable (*Morgan v. Hughes*, 2 T. R. 225).

**Jurisdiction.** In order to constitute a jurisdiction such officer must have before him some suit or complaint about which he has authority to inquire. Thus an information brought before a magistrate charging an offence within his cognizance gives him jurisdiction (*Cave v. Mountain*, 1 M. & G. 257).

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(a) Whether a magistrate would be equally exempted from liability in cases where he had acted maliciously, does not seem to have been decided. It will at once appear that the judgment of the Chief Baron, which I have cited at considerable length on account of its lucid enunciation of the principles on which this exception is based, is broad enough to include actions brought against a justice of the peace. At the same time, it must be admitted the first section of Jervis' Act (11 & 12 Viet. c. 44), as has been pointed out by Mr. Rose in his *Law of Nisi Prius Evidence*, would seem to imply that such an action could be supported. There the matter rests, but I confess I have little doubt, should the question ever arise, that, provided he acts within his jurisdiction, a magistrate is no more answerable (by action, that is to say,) for a malicious act than is a judge of a county court or of the High Court. In this opinion the learned author above cited seems to concur.



**Prima facie Jurisdiction.** Sub-rule.—*A judge of an inferior court having a prima facie jurisdiction over a matter is not responsible for a false imprisonment committed on the faith of such prima facie jurisdiction, if by reason of something of which he could have no means of knowledge he really has no jurisdiction (Calder v. Halkett, 3 Moore, P. C. C. 28).*

Thus if through an erroneous statement of facts a person be arrested under process of an inferior court for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Olliett v. Bessey*, 2 *W. Jones*, 214).

In general, however, where a court has jurisdiction, the person setting it in motion is not liable for a false imprisonment committed under its order, unless he set it in motion maliciously; but where it has no jurisdiction the complainant will be liable, even though acting *bonâ fide* (*West v. Smallwood*, 3 *M. & W.* 421).

**Contempt of Court.** RULE 10.—The superior courts of law and equity have power to punish by commitment for any insult offered to them, and any libel upon them, or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in the court.

(1) During the pendency of a suit, the publisher



of a newspaper commits a contempt of court if he publishes extracts from the affidavits with comments upon them (*Tichborne v. Mostyn*, *L. R.*, 7 *Eq.* 56).

(2) Where an indictment has been removed into the Court of Queen's Bench, and a day appointed for trial, the holding of public meeting, alleging that the defendant is not guilty, and that there is a conspiracy against him, and that he cannot have a fair trial, is a contempt of court (*Ouslow's and Whalley's case*, *Reg. v. Castro*, *L. R.*, 9 *Q. B.* 219).

(3) A solicitor is guilty of a contempt of court in writing for publication letters tending to influence the result of a suit (*Davis v. Eley*, *L. R.*, 7 *Eq.* 49).

(4) It seems that the judge of a county court has power only to commit for contempts committed in the court and whilst it is sitting. (See *R. v. Leroy*, *Weekly Notes*, Feb. 8, 1873.)

(5) A justice of the peace may commit one who calls him in court a liar (*Ree v. Ree*, 1 *Str.* 421).

**Justices.** RULE 11.—If a felony or breach of the peace be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But if he be not present he must issue his written warrant to apprehend the malefactor (2 *Hale*, *Pl. Cr.* 86).

**Protection of Justices acting without Jurisdiction.** RULE 12.—Where a justice acts in a matter without any or beyond his jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof until such conviction shall have been quashed by the proper tribunal in that behalf, nor for anything done under a warrant followed by a conviction or order, until such conviction be quashed, nor at all for anything done under a warrant for an indictable offence, if a summons had been previously served and not obeyed. (See 11 & 12 Vict. c. 44.)

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

It may be also observed that, by sect. 9, a month's notice is required to be given before commencing an action against a justice for any act done in the execution of his office; and by 11 & 12 Vict. c. 44, s. 11, if after such notice, and before the commencement of the action, the justice tender a sum of money in amends, then if the jury shall be of opinion that such sum is sufficient they shall give their verdict for the defendant. A justice acting maliciously is en-

titled to notice and to tender amends (*Leary v. Patrick*, 15 Q. B. 272).

**Malicious Arrest.** This consists in wilfully putting the law in motion to effect the arrest of another without cause. Its occurrence, owing to the practical abolition of imprisonment for debt by the Debtors' Act, 1869, is now infrequent.

**RULE 13.**—Any person maliciously causing the arrest of another is liable to an action.

By a malicious act is not only meant a wicked and spiteful act, but also a deliberately intentional wrong, although done without any actual spite or ill-feeling.

(1) Therefore, if by a false statement or suppression a man obtains the arrest of another, he is liable to an action.

(2) So a false affidavit whereby a judge's order is obtained for the arrest of an absconding debtor, renders the deponent liable to the person arrested.

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**Habeas Corpus.** Such are the leading principles of law relating to deprivation of liberty; it remains to notice a peculiar and unique remedy which the law affords in addition to that by action. I mean the writ of habeas corpus ad subjiciendum.

This writ may be obtained upon motion to any of

the superior courts of law or equity, or to a judge when those courts are not sitting. Probable cause must be shown by the person moving that there is a wrongful detention, and if the court or judge thinks that there is reasonable ground for suspecting illegality the writ is granted.

It is directed to the individual detaining the person in custody, and commands him to produce the body of the prisoner in court on a certain day, and there account for his detention, and to do and submit to whatsoever the court or judge shall order in the matter. If on the day mentioned the detainer can justify the detention, the prisoner is remitted to his custody. If not he is discharged, and may then have his remedy by action.

The writ of habeas corpus existed at common law, but it has been more formally declared and defined by statutes, chief among which are 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.

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**Limitation.** RULE 14.—No action shall be brought for false imprisonment except within four years next after the cause of action arose.

It must be recollected that imprisonment is a continuing tort, and therefore the period runs from the last day of the imprisonment, and not from the first.

*Exceptions.* (1) *Justices.*—An action against a justice of the peace for anything done by him in the

execution of his office must be commenced within six calendar months next after the commission of the act complained of (11 & 12 Vict. c. 44, s. 8).

(2) *Constables*.—Various Acts for the appointment and regulation of police limit the period within which actions may be brought against them. The following are the most important: 10 Geo. 4, c. 44, relating to the Metropolitan police, by sect. 41 enacts that all actions for anything done in pursuance of the Act shall be (inter alia) commenced within six calendar months, and that a month's written notice shall be given to them, and the same provision is extended to special constables and county policemen by 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, respectively. Borough constables are protected in a similar manner by 5 & 6 Will. 4, c. 76, s. 113; and sect. 76 of the same act enacts that men sworn as such shall not only within the borough, but also within the county in which the same is situated, and in any county within seven miles of such borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable at the time of the passing of that act had or thereafter might have within his constablewick.

Constables may also pay money into court. (See 11 & 12 Vict. c. 44, ss. 9, 11.)

All such actions against justices and constables must (by various acts) be laid in the county in which the trespass was committed.

## CHAPTER IV.

## OF ASSAULT AND BATTERY.

**Direct and Indirect bodily Injuries.** Torts affecting the body are either the immediate results of force put in motion by the defendant, or the indirect results of wrongful conduct on his part. In this chapter I shall speak of direct bodily injuries or trespasses.

**Causing Death.** Direct personal injuries causing death are crimes of a most heinous nature. They rather come, therefore, under the ordinances of the criminal than of the civil law. Putting these aside, all other direct bodily injuries may be considered as either assaults or more or less aggravated forms of battery.

**Definition of Assault.** An assault is an unsuccessful attempt to do harm to the person of another.

**RULE 15.**—If one make an attempt, and have at the time of making such attempt a present ability to do harm to the person of another, although he actually do no harm, it is nevertheless an assault.

(1) Such, for instance, is menacing with a stick a person within reach thereof, although no blow be struck (*Read v. Coker*, 13 C. B. 850).

(2) But a mere threat is no assault, unless there be a present ability to carry it out.

This was illustrated by Pollock, C.B., in *Cobbet v. Grey* (4 Eech. 744). "If," said that learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (a), 'I will commit an assault,' I think that is not an assault."

(3) To constitute an assault there must be an attempt. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville v. Savage*, 1 Mod. 3).

(4) For the same reason shaking a stick in sport at another is not actionable (see *Christopherson v. Barr*, 11 Q. B. 477).

**Battery.** RULE 16.—The least touching of another's person hostilely or against his will is a battery (*Rawlings v. Till*, 3 M. & W. 28).

This touching may be occasioned by a missile or any instrument set in motion by the defendant, as

(a) Query—battery.

? Empty threat.



by throwing water over another (*Russell v. Horne*, 8 A. & E. 602), or spitting in his face. In accordance with the rule a battery must be involuntary; therefore a voluntarily suffered beating is not actionable (Patteson, J., in *Christopherson v. Bare*, 11 Q. B. 477). Merely touching a person in order to engage his attention is, however, no battery (*Coward v. Baddeley*, 28 L. J., Ex. 261).

**Wounding and Maiming.** If the violence be so severe as to wound, the damages will be greater than those awarded for a mere battery; so also if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), but otherwise the same rules of law apply to these injuries as to ordinary batteries.

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**Intention.** Rule 17.—An injury may be a trespass although unintentional, unless it were the result of inevitable accident (*Covell v. Laming*, 1 Camp. 477).

(1) Thus where the defendant unintentionally upset the plaintiff in his carriage, it was held to be a trespass (*Hopper v. Reeve*, 7 Taunt. 698).

(2) Indeed an act which is of itself lawful may be a trespass if another suffers damage thereby, for every bodily injury is an invasion of a right and is actionable unless caused by unavoidable accident (in which case it may be said to be the act of no one), or by the negligence or malice of a third party.

Thus if a man assault me, and in lifting up my stick to defend myself I hit another, an action lies against me (per Blackstone, J., in *Scott v. Shepherd*, 2 *W. Bla.* 894); and so in *Weaver v. Ward*, it was held that no man shall be excused of a trespass, except it may be judged utterly without his fault (*Hob.* 134).

Such being the nature of a battery, let us now consider when it is, and when not, a tort.

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RULE 18.—Every man has an inherent right to immunity from interference with, or violence or injury to, his body at the hands of any other person.

*Exceptions.* (1) *Self-Defence*.—A battery is justifiable if committed in self-defence. Such a plea is called a plea of son assault demesne. But to support it, the battery justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft v. Smith*, 11 *Mod.* 43). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cooper v. Beale*, *L. Raym.* 177).

(2) *Defence of Property*.—A battery committed in defence of real or personal property is justifiable.

Thus if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, I must

first request him to leave. If after that he still refuse, I may use sufficient force to remove him, in resisting which, he will be guilty of an assault (*Wheelor v. Whiting*, 9 C. & P. 265).

So a riotous customer may be removed from a shop after a request to leave.

(3) *Correction of Pupil*.—A father or master may moderately chastise his son, pupil, or apprentice (*Penn v. Ward*, 2 Cr., M. & R. 338).

*Other Exceptions*.—An assault may be committed in order to stop a breach of the peace; to arrest a felon, or one, when a felony having actually been committed, is reasonably suspected of it; in arresting a person *found committing* a misdemeanor between the hours of 9 p.m. and 6 a.m.; in arresting a malicious trespasser, or vagrant under the Vagrancy Act.

A churchwarden or beadle may eject a disturber of a congregation, and a master of a ship may assault and arrest an unruly passenger. So assaults and batteries, committed under legal process, are justifiable; but a constable ought not *unnecessarily* to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin v. Coleman*, 28 L. J., Ex. 134) (a).

**Defence under 24 & 25 Vict. c. 100.** By sections 42, 44, 45, it is enacted, in effect, that,—

Sub-rule.—*Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon*

(a) The same rule as to notice, tender of amends and limitation applies to batteries committed by constables in the execution of their duty as in false imprisonment.

complaint by or on behalf of the party aggrieved, may hear and determine such offence, and if the justices, upon the hearing of any such case, should deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate stating the fact of such dismissal, and shall deliver the same to the party charged; and if any such person shall have obtained such certificate, or having been convicted shall have paid the amount of the fine imposed, or shall have suffered the imprisonment inflicted, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause (see also sect. 43).

(1) A party having been summoned before two justices under 9 Geo. 4, c. 31, s. 27 (a statute containing an enactment similar to the above), for an assault, appeared and pleaded not guilty; the plaintiff declined to proceed, stating that he meant to bring an action. The justices dismissed the complaint, and gave the following certificate:—"We deemed the offence not proved, inasmuch as the complainant did not offer any evidence in support of the information, and have accordingly dismissed the complaint:" held, that what passed before the justices constituted a hearing, and that the certificate was a complete bar to an action for the assault (*Tanniclyffe v. Todd*, 5 C. B. 553).

As to what constitutes a "hearing," see also *Vaughton v. Bradshaw*, 9 C. B., N. S. 103.

(2) The words "from all further or other proceed-

ings against the defendant, civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person consequentially aggrieved thereby (*Masper and wife v. Brown*, *L. R.*, 1 *C. P. Div.* 97; 25 *W. R.* 62).

(3) If a person is charged for an assault, and the complaint is dismissed and a certificate given him, he cannot avail himself of the defence under the statute, when sued on for the tort, unless he specially pleads such defence (*Harding v. King*, 6 *C. & P.* 427).

**Damages.** RULE 19.—In assessing what amount of damages may be recovered for an assault, or battery, or mayhem, the time when, and the place in which, the assault took place should be taken into consideration.

Thus an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks Bathurst, J., in *Tullidge v. Wade* (3 *Wils.* 19), "to be beaten upon the Royal Exchange than in a private room."

**Limitation.** Rule 14 applies to assault and battery.

## CHAPTER V.

## OF BODILY INJURIES CAUSED BY NUISANCES.

**Definition.** The word nuisance (from the French *nuire*, to hurt) is applied in the English law indiscriminately to infringements of proprietary or personal rights (*Ad. 155*) ; but for the purposes of this chapter it may be defined, as any wrongful conduct in the management of property, or any wrongful interference with the property of the public, not necessarily depending for its wrongful character upon negligence.

**General Duty.** RULE 20.—A person is bound so to use his property as not to injure other persons, and he is also bound to observe the express provisions of the law with regard to the user of his own and the public property.

(1) *Excavations.* Thus where a man makes an excavation adjoining a highway, and keeps it unfenced, he will be liable for any injury occasioned to a person falling into it (*Barnes v. Ward*, 9 C. B. 392 ; *Bishop v. Trustees of Bedford Char.*, 28 L. J., Q. B. 215).

(2) *Noxious Fumes.* And so anything injurious

to the health of persons living near, as a foul cess-pool, or any noisome or noxious employment, act, or omission, is a nuisance.

(3) *Statutory Nuisances.* Certain acts have been declared nuisances by statute, and private damage caused by them is of course actionable. Thus by 24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), the setting of spring-guns, man-traps, or other engines calculated to kill or do grievous bodily harm to a trespasser is made a misdemeanor, and even a trespasser hurt thereby may recover; for although it would be partly owing to his own misconduct, yet if the defendant might, by acting rightly, have avoided doing the injury, the plaintiff's contributory misconduct is no excuse. But this act does not apply to the setting of traps or guns in the night in dwelling-houses for the protection thereof.

(4) So by the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70, it is made illegal for any person to sink any pit, or erect any steam or other like engine, gin, or machinery attached thereto, within twenty-five yards from any part of a carriage or cart way, unless concealed within some building or behind some fence, so as to guard against danger to passengers, horses, or cattle. It also prohibits the erection of windmills within fifty yards, and fires for the burning ironstone, limestone, or making bricks or coke, within fifteen yards of a carriage or cart way.

Sect. 72 prohibits the letting off of fireworks or firearms within fifty feet of the centre of the way, as also laying of things upon it or obstructing it in any way.



This Act creating these or some of these duties, any corporal injury caused to an individual by their non-observance is actionable, even though the person injured were trespassing at the time (within twenty-five yards of the way). But if the Act has been complied with, any injury caused by any of the things therein mentioned would be no ground of action, there being no *injuria* or wrongful act.

(5) Thus where the defendants were owners of waste land bounded by two highways, and worked a quarry outside the prohibited distance in such land, and the plaintiff, walking over the waste, fell into the quarry and broke his leg, it was held that no action lay, the plaintiff being a mere trespasser (*Hounsell v. Smith*, 29 *L. J.*, *C. P.* 203; and see *Binks v. S. Y. & R. D. R. Co.*, 32 *L. J.*, *Q. B.* 26; *Hardcastle v. S. W. & Y. D. R. Co.*, 23 *L. J.*, *Ex.* 139).

And so, by the civil law, a trespasser could not recover for injuries suffered whilst trespassing, through the dangerous business of the landowner, for "*extra culpam esse intelligitur si seorsum a via forte vel in medio fundo cædebat, quia in loco nulli extraneo jus fuerat versandi*" (*Inst.*, lib. iv., iii. 5).

(6) *Ruinous Premises.* Leaving premises adjoining a highway, or the land of another, in a ruinous condition is a public nuisance entitling a person, injured thereby, to damages (*Todd v. Flight*, *L. J.*, *C. P.* 21).

**Negligence Immaterial.** RULE 21.—When anything has been done or permitted upon property, which has in fact created or

perpetuated a nuisance, the person in possession of the property is liable for any damage caused thereby, notwithstanding that he employed a competent person to do or repair the thing.

Thus, in *Terry v. Ashton* (*L. R.*, 1 *Q. B. Div.* 314), the defendant had a lamp or lamp-iron projecting from his premises over the street, and had given orders to a competent contractor to repair it; but the contractor had done the work badly, by reason of which the lamp fell and injured the plaintiff: Held, that the defendant was liable. And Lush, J., said: "The question is, What is the duty of an occupier who has a lamp in the position of that of the defendant? Is his duty absolutely to maintain that lamp in proper repair, or to employ a competent person to repair it? I apprehend that the wider duty is incumbent on the occupier. He permits a lamp to hang over the public highway, and continues it there for the benefit of his own trade, and thereby, if the lamp is not in a safe condition, puts the public in danger. He is thus placed under a liability which he cannot shift from his own shoulders by saying, 'I have employed another person to do it for me.' He, and he only, is primarily bound to keep the lamp in repair, and he is answerable for the consequences if it is not so, and has his remedy over against the negligent contractor."

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**Owner and Occupier.** But here a question arises as to the respective liabilities of the landlord and the tenant.

**RULE 22.**—As between landlord and tenant, there is no implied obligation on the part of the former that the property is in a safe condition (*Keats v. Cadogan*, 20 *L. J.*, *C. P.* 21). With regard to third parties, the tenant is the person responsible for any injury resulting from the premises being out of repair, and the landlord will also be responsible if he has done any act authorizing the continuance of the dangerous state of the house (per Bovill, *C. J.*, *Pretty v. Bickmore*, *L. R.*, 8 *C. P.* 404.)

(1) Thus, if in consequence of the ruinous state of a house, the chimney fall and injure the tenant's family, yet he has no remedy, unless the landlord had contracted to keep the house in repair, or unless there was fraud on his part in concealing the defect from the tenant (*Gott v. Gandy*, 23 *L. J.*, *Q. B.* 1; *Keats v. Cadogan*, 20 *L. J.*, *C. P.* 76).

(2) The defendant let premises to a tenant under a lease, by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, at the time of the demise, out of repair and dangerous. A passer by, in consequence, fell into the aperture, and was injured: Held, that the obligation to repair, being, by the

lease, cast upon the tenant, the landlord was not liable for this accident. And Keating, J., said, "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorized the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair (see also *Gwinnell v. Eamer*, *L. R.*, 10 *C. P.* 658, and *Rich v. Basterfield*, 16 *L. J.*, *C. P.* 273; and comp. *Roswell v. Prior*, 12 *Mood.* 639).

(3) In *Nelson v. The Liverpool Brewery Co.* (25 *W. R.* 877) Lopes, J., laid it down, that the owner of premises demised to a tenant is not liable for an injury sustained by a stranger, owing to the premises being out of repair, unless he has either contracted to do the repairs, or *has let the premises in a ruinous and improper condition*. It is, however, humbly suggested that the last alternative is not accurate, except where the tenant has not undertaken the repairs; and the dictum is not a complete summary of the law, inasmuch as there may be possible cases where the landlord may *prevent* the tenant from repairing a nuisance, by threatening an action for waste.

(4) But in *Todd v. Flight* (30 *L. J.*, *C. P.* 21; 9 *C. B.*, *N. S.* 377), where the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and

in danger of falling, and that he *kept and maintained them in that state*, and the case was tried on demurrer, and the allegation was therefore assumed to be true, it was held that the landlord was liable.

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**Nuisances on Private Ways.** RULE 23.—When a person expressly or impliedly permits others to come on to private ways on his land, he is liable for any injury caused to them by a nuisance thereon or near to the same, but not if they stray from such paths and trespass on the adjoining ground.

(1) Thus a person permitting the use of a pathway to his house, holds out an invitation to all having any reasonable ground for coming to the house, to use his footpath, and he is responsible for neglecting to fence dangerous places; and so also a shopkeeper, who leaves a trap-door open without any protection, is liable to a person lawfully coming there who suffers injury by falling through such trap-door (Tindal, C. J., *Lancaster Canal Co. v. Parnaby*, 11 A. & E. 243; *Barnes v. Ward*, 9 C. B. 420; 19 L. J., C. P. 200; and see *Blyth v. Topham*, 1 Roll. Ab. 88).

But where a person, straying from the ordinary approaches to a house, trespasses where there is no path, and falls into an unguarded pit, he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and

misconduct, and accordingly the doctrine of contributory negligence applies (*Wilde, B., Bolch v. Smith*, 31 *L. J., Ex.* 203).

(2) Railway companies are responsible for the state of their works, and therefore are liable to any person injured by the faulty construction or negligent keeping up of their bridges, embankments, &c. (*Chester v. Holyhead R. Co.*, 2 *Ex.* 251). But if the ruinous state has been caused by a *vis major* or act of God, (as where the railway gave way through an extraordinary flood,) the company are not liable, provided their line was constructed so firmly as to be capable of resisting the foreseen though more than ordinary attacks of the weather (*Withers v. North Kent R. Co.*, 27 *L. J., Ex.* 417; *G. W. R. Co. of Canada v. Fawcett*, 1 *Moore, P. C. C., N. S.* 120).

(3) *Canals.* So too canal companies are bound to take reasonable care to make their canal as safe as possible to those using it (*Lanc. Can. Co. v. Parnaby*, 11 *A. & E.* 243).

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**Injuries to Guests.** RULE 24.—Mere guests, licensees and volunteers are considered as temporary members of the host's family, and can therefore only recover for injuries caused to them by hidden dangers which they did not know of, but which the host knew or ought to have known of. But visitors on business which concerns the occu-



pier of premises, may maintain an action for any injury caused by the unsafe state of the premises.

(1) Thus in *Southcote v. Stanley* (1 H. & N. 247), the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held, that the plaintiff being a guest was for the time being one of the family and could not recover for an accident, the liability to suffer which, he shared in common with the rest of the family.

(2) *Persons coming on Business.* But where, on the contrary, a workman came *on business* to the defendant's manufactory, and there fell down an unguarded shaft, the defendant was held to be liable; although it would have been otherwise had the plaintiff been one of his own servants, for it was not a hidden danger (*Indermaur v. Dames*, L. R., 1 C. P. 274; 2 *ib.* 311).

(3) The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendants was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger: Held, that the defendants were liable (*White v. France*, L. R., 2 C. P. D. 308).

(4) *Nuisances on Railway Stations.* So in the case of railway companies, the company must take great care to ensure the safety of persons coming to their station, and if through want of light or proper direc-





## CHAPTER VI.

OF INJURIES TO PERSON OR PROPERTY CAUSED BY  
NEGLIGENCE.

It is a public duty, incumbent upon every one, to exercise due care in his daily life; and any damage resulting from his negligence is a tort.

**Definition.** RULE 26.—The negligence in respect of the duty which is actionable, is the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do (*Blythe v. Birm. Water Co.*, 25 *L. J.*, *Ex.* 212).

(1) Thus, where the plaintiff was in the occupation of certain farm buildings, and of corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held, that the defendant was liable (*Vaughan v. Menlove*, 3 *Bing. N. C.* 468).

(2) So where the defendant entrusted a loaded gun to an inexperienced servant girl, with directions to take the priming out, and she pointed and fired it at the plaintiff's son, wounding and injuring him—the defendant was held liable (*Dixon v. Bell*, 5 *M. & S.* 198).

(3) On the other hand, a water company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipes by an extraordinarily severe frost (*Blythe v. B. W. W. Co., sup.*).

(4) And so where the defendants' line was misplaced by an extraordinary flood, and by such misplacement injury was done to the plaintiff, it was held that no action could be maintained against the defendants (*Withers v. The North Kent R. Co., 27 L. J., Ex. 417*).

(5) Again, a valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried; and the fare was demanded and paid. At the time of delivery the greyhound had on a leathern collar, with a strap attached thereto. In the course of the journey, it being necessary to remove the greyhound from one train, to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of a station, and, while so fastened, it slipped its head, ran on the line, and was killed: Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence (*Richardson v. N. E. R. Co., L. R., 7 C. P. 78*).

See also *Holmes v. Mather, L. R., 10 Ex. 261*; *Watling v. Oastler, L. R., 6 Ex. 73*; *John v. Bacon, L. R., 5 C. P. 437*; *Welfare v. London and Brighton R. Co., 4 Q. B. 693*; *Daniel v. Met. R. Co., L. R., 5 H. L. 45*; *Richardson v. G. E. R. Co., L. R., 10*

*C. P.* 486; *Smith v. G. E. R. Co., L. R., 2 C. P. 4*; *Simson v. London General Omnibus Co., L. R., 8 C. P. 390*.

(6) From the above rule and illustrations, it will be seen that the term negligence is quite a relative expression, and that in deciding whether a given act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

**Contributory Negligence.** RULE 27.—Though negligence whereby actual damage is caused is actionable, yet if the plaintiff has himself contributed to his loss, he cannot recover from the defendant, except in the case hereinafter mentioned.

The same principle held in the civil law, "*Imperitia quoque culpæ enumeratur; veluti si medicus ideo servum tuum occiderit, quod cum male secuerit aut perperam ei medicamentum dederit*" (*Inst. lib. iv., iii. 7*). And so contributory negligence was held an excuse in case of injury occurring to another. Indeed,

the civilians carried the principle much further than we do.

(1) This rule is well illustrated by two cases, in each of which the *damnum* was the same. In *Fordham v. L. B. & S. C. R. Co.* (*L. R.*, 4 *C. P.* 719) the facts were these. The guard of one of the defendants' trains, forcibly closed the door of one of the carriages without giving any warning, whereby the hand of the plaintiff, who was entering the carriage, was crushed. It was held, that the jury were justified in finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff.

(2) Where, however, the plaintiff, on entering a railway carriage, left his hand on the edge of the door half a minute after so entering, and the guard gave due warning before shutting the door, it was held that the act was attributable to the plaintiff's contributory negligence, in leaving his hand carelessly upon a door which he must have known would be immediately shut (*Richardson v. Metropolitan R. Co.*, *L. R.*, 3 *C. P.* 326).

(3) And so in cases of collision, the question is, whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that but for his default in this respect the disaster would not have happened. In the former case he recovers, in the latter not (*Tuff v. Warman*, 27 *L. J.*, *C. P.* 322); and for

further illustrations of the rule, see *Sketton v. L. & N. W. R. Co.*, *L. R.*, 2 *C. P.* 631; *Stubley v. L. & N. W. R. Co.*, *L. R.*, 1 *Ex.* 13; *Stapley v. L. B. & S. C. R. Co.*, *L. R.*, 1 *Ex.* 21; *Cliff v. Mid. R. Co.*, *L. R.*, 5 *Q. B.* 258; *Ellis v. G. W. R. Co.*, *L. R.*, 9 *C. P.* 551.

**Where Contributory Negligence no Excuse.** Sub-rule 1.—*If the defendant might, by the use of ordinary care, have avoided the consequences of the plaintiff's mere negligence, the plaintiff is to recover.*

The law on this point is thus summarized by Willes, J.: "If both parties were equally to blame, and the accident the result of their joint negligence, the plaintiff could not be entitled to recover; if the negligence and default of the plaintiff was in any degree the proximate cause of the damage he could not recover, however great may have been the negligence of the defendant; but if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not by the exercise of ordinary care have avoided it" (*Tuff v. Warman*, 27 *L. J.*, *C. P.* 322).

(1) Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and had he done so he might readily have avoided driving over the ass (*Davies v. Mann*, 10 *M. & W.* 549).

(2) So, where the plaintiff was a passenger on an omnibus, which was racing with the defendant's



omnibus, and in trying to avoid a cart a wheel of the defendant's omnibus came in contact with a step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the curb-stone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post and he was thrown off: Held, that the jury were properly directed that the defendant was liable (*Rigby v. Hewitt*, 5 *Ex.* 247).

(3) The plaintiff, a passenger on board a steamboat, was injured by the falling of an anchor, caused by the defendant's steamboat striking the other steamboat. It was no defence to say that the accident arose in part from the negligent stowage of the anchor, or that the plaintiff was in a part of the vessel he ought not to have been (*Greenland v. Chaplin*, 5 *Ex.* 243).

### **Contributory Negligence in Infants.**

Sub-rule 2.—*It was formerly thought that where the plaintiff was a child of tender years, it was no defence to an action of negligence to prove that he himself had contributed to his injury (Lynch v. Nurdin, 1 Q. B. 29); but it seems to be now clearly settled that the principle of contributory negligence applies to all cases, whether the plaintiff can be considered of an age to know the nature of the act he is doing, or otherwise (Singleton v. Eastern Counties R. Co., 7 C. B., N. S. 287; Abbot v. McFie, Hughes v. McFie, 8 II. & C. 744; 33 L. J., Ex. 177).*

So, where the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any



passer-by, and which was dangerous when in motion, and the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his finger within the machine, whilst another boy was turning the handle which moved it, and his fingers were crushed: Held, that the plaintiff could not maintain any action for the injury (*Mangan v. Atterton*, *L. R.*, 1 *Exc.* 239).

But it appears that what would amount to contributory negligence in a grown-up person may not be so in a child of tender years (per Kelly, C. B., *Lay v. M. R. Co.*, 34 *L. T.* 30).

**Liability of the Owner of Dangerous Animals.** RULE 28. — If an animal is known to be likely to do harm, or to possess a savage disposition, the owner thereof is answerable for any injury he may commit, and that, too, though he has done his best to secure his safe keeping. In other words, he who keeps an animal of the above description (*May v. Burdett*, 9 *Q. B.* 101), knowing it to be so, does it at his peril (*Cox v. Burbidge*, 13 *Com. B.*, *N. S.* 430).

If the animal is by nature dangerous, no actual knowledge of its previous disposition is necessary, but if the animal is naturally domestic then actual knowledge of his fierceness must be proved (*R. v. Huggins*, 2 *Ld. Raym.* 1583). See also *Saunders on Negli-*

gence, p. 99, where the whole subject is very ably discussed.

(1) It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal has actually bitten another person before it bit the plaintiff; it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite (*Worth v. Gilling*, *L. R.*, 2 *C. P.* 685). It has been held that, if the owner of a dog appoints a servant to keep it, the servant's knowledge of the animal's disposition is the knowledge of the master (*Baldwin v. Casella*, *L. R.*, 7 *Ex.* 325). But where the complaint is made to a servant, who has no control over the defendant's business, nor of his yard where his dog was kept, nor of the dog itself, the knowledge of the servant would not necessarily be that of the master (*Stiles v. The Cardiff Steam Navigation Co.*, 33 *L. J.*, *Q. B.* 310).

(2) But where, in order to fix the defendant with knowledge of the ferocious nature of his dog, which had bitten the plaintiff, two persons, who had upon previous occasions been attacked by it, were called to prove that they had gone to the defendant's public-house, and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid, but there was no evidence that these complaints were communicated to the defendant, nor was it shown that either of the two men spoken to, had the general management of the defendant's business, or had the

care of the dog: Held (Brett, J., dissenting), that there was evidence of scienter to go to the jury (*L. R.*, 9 *C. P.* 647).

*Exception.* By 28 & 29 Vict. c. 60, s. 1, a scienter of a dog's disposition, who has injured sheep or cattle, need not be proved. It has been held that horses are to be included under the term cattle (*Wright v. Pearson*, *L. R.*, 4 *Q. B.* 582. For further cases on the subject of keeping dangerous animals, see *Brook v. Copeland*, 1 *Esp.* 302; *Gladman v. Johnson*, 36 *L. J.*, *C. P.* 150).

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**Lord Campbell's Act.** Previously to this Act, no action could be maintained by the representatives of a person who had been killed by the negligence of another. The maxim *Actio personalis moritur cum personâ*, strictly applied, and the right of action was held to die with the person. By sect. 1 of this Act, the law is now altered, and it is thereby enacted—

**RULE 29.**—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person in-

jured, and although the death shall have been caused under such circumstances as amount in law to a felony (9 & 10 Vict. c. 92, s. 1).

Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct (sect. 2).

Not more than one action shall lie for the same cause of complaint, and every such action shall be commenced within twelve calendar months after the death of such deceased person (sect. 4).

Where there is no executor or administrator, as above stated, or if there is such executor or administrator, but no action is brought within six months by him, the action may be brought in the name or names of all

or any of the persons for whose benefit the personal representative would have sued (27 & 28 Viet. c. 95, s. 1).

In respect to actions brought under the provisions of this statute, the following points must be remembered—

(1) The personal representatives (or should they not sue, the parties mentioned in the last clause of the rule) can only maintain the action in those cases in which, had the deceased lived, he himself could have done. So, if the deceased had been guilty of such contributory negligence as would have barred him from succeeding, those claiming as his representatives can stand in no better position (*Pym v. G. N. R. Co.*, 4 B. & S. 396).

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased.

The word *parent* shall include a grand-parent and a step-parent. The word *child*, a grand-child and a step-child, but not a bastard (*Dickinson v. N. E. R. Co.*, 2 Hurl. & Coll. 735).

The jury may proportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*Franklin v. S. E. R. Co.*, 3 Hurl. & N. 211).

By the expression "*pecuniary loss*" is meant "some substantial detriment in a worldly point of view." So, loss of reasonably anticipated pecuniary benefits,

loss of education or support is sufficient (*Pym v. G. N. R. Co.*, *sup.*; *Franklin v. S. E. R. Co.*, *sup.*). Loss of mere gratuitous liberality (*Dalton v. S. E. R. Co.*, 27 *L. J.*, *C. P.* 227), or to his personal property by expenses incurred in medical treatment is equally so (*Bradshaw v. Lanc. & York. R. Co.*, *L. R.*, 10 *C. P.* 89). Funeral expenses *aliter* (per Bramwell, *Osborn v. Gillet*, *L. R.*, 8 *Ex.* 88).

(4) If the deceased had obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*Read v. G. E. R. Co.*, *L. R.*, 8 *Q. B.* 555).

(5) The death must be actually caused by the wrongful act for which compensation is sought.

(6) The action must be brought within twelve calendar months after the death of the deceased.

**Proof of Negligence.** RULE 30.—As a general rule the onus of proving negligence is thrown upon the plaintiff (*Hammack v. White*, 11 *C. B.*, *N. S.* 588; *Toomey v. L. & B. R. Co.*, 3 *C. B.*, *N. S.* 146).

*Exception.* Where, however, a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things, and use proper care, it affords, *prima facie*, evidence of negligence (*Scott v. London Dock Co.*, 34 *L. J.*, *Ex.* 220; *Byrne v. Boodle*, 2 *Hurl. & Coll.* 722).



**Duties of Judge and Jury in case of Negligence.** RULE 31.—Whether there is *reasonable* evidence to be left to the jury, of negligence occasioning the injury complained of, is a question for the judge. It is for the jury to say whether, and how far, the evidence is to be believed (*Met. R. Co. v. Jackson, L. R., 8 H. L. 193*).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is *reasonable* evidence of negligence, and then leave it to the jury to find whether the facts which afford that reasonable evidence are true. The law is thus summarized in the above case, important alike for the high tribunal before which it was heard, and the recent date of its decision. “The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred. It is, in my opinion, of the greatest importance in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury, upon the ground that in his opinion negligence ought not



to be inferred. And it would place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies : a company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in banco, on the ground that the verdict was against evidence ; but it is to be observed that such an application, even if successful, would only result in a new trial. And on a second trial, and even on subsequent trials, the same thing might happen again."

## CHAPTER VII.

## OF ADULTERY AND SEDUCTION.



## SECTION I.

*Adultery.*

**Nature of.** Adultery is the having criminal intercourse with the wife or husband of another. As between man and wife the law under certain conditions gives a remedy by divorce, but of this it is not my intention here to treat. It also gives to an injured husband a further remedy.

**Damages.** RULE 32.—A husband may in a petition to the Divorce Division of the High Court claim damages from any person on the ground of his having committed adultery with his (the petitioner's) wife (20 & 21 Vict. c. 85, s. 33).

Before the passing of the above Act the remedy which a husband had against the seducer of his wife was an action of criminal conversation, or "*crim. con.*" as it was usually called. That action is, however, now abolished, and the remedy indicated in the preceding rule substituted in its stead.

By sect. 33 of the same Act the court is empowered to direct in what way the damages obtained shall be applied.

The usual course is, first, to allow the petitioner his costs, and, then, to settle the residue on the wife (while she remains chaste) and children, the wife taking the interest during her life, and the children taking the principal after her death (*Mayne on Damages*, 386; *Latham v. Latham and Gethin*, 30 *L. J.*, *P. M. & A.* 43; *Clarke v. Clarke*, 31 *L. J.*, *P. M. & A.* 61).

The court has, however, entire discretion over the application of the damages, and, accordingly, where it was proved, on the hearing of the petition, that there had been no issue of the marriage, and that the respondent was living with the co-respondent, the court made the order for the payment of damages assessed against the co-respondent part of the decree *nisi*, instead of postponing it until the decree absolute (*Evans v. Evans*, *L. R.*, 1 *P. & D.* 36).

**Mitigation of Damages.** It is obvious that it is impossible to assess the damages in the case of adultery according to any scale calculated on the ground of giving compensation. It is in fact a wrong for which no adequate compensation can be given. The damages are therefore more properly regarded as in their nature penal, and accordingly vary very much according to more or less heinous circumstances of each case, in accordance with Rule 23, Part 1.

Sub-rule.—*The amount of the damages depends upon*

*the husband's circumstances and conduct, the terms upon which he and his wife lived together, and the wife's general character* (*Ad.* 899).

(1) Thus evidence of the wife's adultery with other men before the adultery with the co-respondent, is admissible in reduction of damages, as showing that the petitioner has lost but a worthless wife (*Winter v. Henn*, 4 C. & P. 498; *Foster v. Foster*, 33 L. J., P. & M. 150, n.).

(2) And so is evidence that the marriage was kept secret, and that the defendant did not know of it (*Calcraft v. Earl of Harborough*, 4 C. & P. 501).

(3) So also are letters from the respondent to the co-respondent enticing him to commit the adultery (*Elsam v. Farewell*, 2 Esp. 562).

(4) So, also, where the husband and wife are living apart in different families, for their mutual convenience (as opposed to a total separation), the damages may be thereby reduced (*Edwards v. Crock*, 4 Esp. 39).

*Exceptions.* A petitioner will not be entitled to recover if he has been a party to his own dishonour, either by giving his wife a general licence to conduct herself as she pleased with men generally, or by consenting to the particular adultery with the co-respondent, or by having permanently and totally given up all advantage to be gained from her society (*Alderson, B.*, *Winter v. Henn*, 4 C. & P. 498), or by condoning the adultery (*Morris v. Morris*, 30 L. J., M. 111).

Thus encouraging a wife to live as a prostitute, is

a bar to damages for adultery with her (*Cibber v. Sloper*, cited 4 T. R. 655).

Such is a brief exposition of the law relating to a husband's remedies against the seducer of his wife. With regard to matrimonial wrongs as between husband and wife, they do not come within the scope of this work, being in my opinion certainly not torts, more probably wrongs *ex contractu*, but still more probably wrongs *sui generis* and *unique*.



## SECTION 2.

### *Seduction and Injuries to Services.*

**Whence arising.** An action lies by a master or parent against a person who deprives him of the services of his child or servant; and although this usually occurs through the debauching of such child or servant, yet it is by no means confined to that offence, for it equally lies against one who merely entices a servant away from his master, the gist of the action being the loss of service caused by the defendant's wrongful act.

**RULE 33.**—Every person designedly (1) procuring a servant to depart from the master's service during the stipulated period of service, or (2) harbouring such servant, after quitting the master, during such period, is liable to an action (*Lumley v. Gye*, 2 Ell. & Bl. 224; *Blake v. Lanyon*, 2 T. R. 221).

Thus, if I employed (against the will of his master) an apprentice or servant before the expira-

tion of his term of service, I should be liable, for by so doing I should be affording him the means of keeping out of his master's service.

**Contract of Service when implied.** Sub-rule 1.—*In order to support an action for enticing away the plaintiff's servant, it is sufficient if a contract of service can be implied from the relation between the plaintiff and the alleged servant.*

Thus, in *Ecaus v. Walton* (L. R., 2 C. P. 615), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express contract or wages, was induced by the defendant to leave her father's house: it was held, that the relation of master and servant might be implied from these circumstances, and that it matters not whether the service is at will or for a fixed period.

Sub-rule 2.—*If the defendant has gained anything from the servant's labour, the master may recover it* (*Foster v. Stewart*, 3 M. & S. 201).

It must be noticed that if the master recover damages from the servant for leaving his service, he cannot, after that, bring another action against a third party for unlawfully enticing that servant to do so, or for keeping him in his employment after notice (*Bird v. Randall*, 3 Burr. 1345; *Add.* 962).

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**Seduction and debauching of Daughter.**  
**RULE 34.**—An action for seduction cannot be maintained without proof of liability to service, and it is not sufficient to show that

the plaintiff has incurred expense through the confinement of the girl; but it is not necessary to prove an actual contract or payment of wages (*Satterthwaite v. Dewhurst*, 5 *East*, 47 n.; *Bennet v. Allcott*, 2 *T. R.* 166).

(1) But small services suffice, such as milking, or even making tea (*Bennet v. Allcott*, *supra*; *Carr v. Clark*, 2 *Chit. R.* 261).

(2) Where the daughter lived at, and assisted in the duties of, the house from six in the evening until seven in the morning, and the rest of the day was employed elsewhere: it was held sufficient evidence of service (*Rist v. Taux*, 32 *L. J.*, *Q. B.* 387); and where the daughter is a *minor* living with her father, service will be presumed (*Harris v. Butler*, 2 *M. & W.* 542).

(3) But where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*Dean v. Peel*, 5 *East*, 45); not even when she partly supports her father (*Manley v. Field*, 29 *L. J.*, *C. P.* 79).

(4) The plaintiff's daughter, being under age, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her: it was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient evidence of service



to maintain an action for the seduction (*Terry v. Hutchinson*, *L. R.*, 3 *Q. B.* 599).

(5) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, providing she still continues, in point of fact, one of his own household (*Griffiths v. Treetjen*, 15 *C. B.* 344).

**Relation of Master and Servant at time of Seduction.** Sub-rule.—*The relation of master and servant must exist at the time of the seduction* (*Davies v. Williams*, 10 *Q. B.* 725), and it would appear, also, that the confinement or illness of the girl must have happened while she was in the plaintiff's service.

Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three-days' visit, with her employer's permission, to the plaintiff her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother: Held, that there was no evidence of service at the time of the seduction. And also by Kelly, C. B., and Martin and Bramwell, BB., that the action must also fail on the ground that the confinement did not take place whilst the daughter was in the plaintiff's service (*Hedges v. Tagg*, *L. R.*, 7 *Ex.* 283).

**Death caused by Seduction.** In this case, probably no action could be maintained, on the

ground that the "*Actio personalis moritur cum persona*" (*Osborn v. Gillet*, *L. R.*, 8 *Ex.* 88).

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**Misconduct of Parent.** RULE 35.—If the parent has introduced the daughter to, or has encouraged profligate or improper persons, or has otherwise courted his own injury, he has no ground of action (*Ad.* 906).

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie v. Scoolt*, 1 *Peake*, 316).

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**Who may bring the Action.** RULE 36.—Any person who at the time of the seduction, and, as shown above, at the time of the illness accruing therefrom, stands in the position of father (or mother) and master, or guardian and master, or master only, may bring the action (*Ad.* 906).

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**Damages.** Although the gist of the action is loss of service, yet the law somewhat inconsistently ordains that—

**RULE 37.**—Damages may be given for the loss which the plaintiff has sustained of the society and comfort of his child and by the dishonour he has received and the anxiety and distress which he has suffered (*Bedford v. McKnoven*, 3 Esp. 120; *Terry v. Hutchinson*, L. R., 3 Q. B. 599).

The plaintiff may recover any expenses he has been put to by his daughter's or servant's illness, as, for instance, for the medical assistance he has been obliged to procure.

**Aggravated Damages.** Sub-rule 1. — *Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated on that account.*

Thus if he make advances under the guise of matrimony, and being civilly received by the plaintiff, repays his kindness with this worst of insults, the damages will properly be exemplary (see judgt. *Talldge v. Wade*, 3 Wils. 18).

*Exception.* But a promise to marry is no aggravation, the breach of it being a distinct ground of action, having an appropriate remedy.

**Mitigated Damages.** Sub-rule 2.—*The defendant may show the loose character of the daughter in mitigation of damages (Id. 909; Rose. 799).*

Thus the defendant may call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager v. Grimwood*, 16 *L. J., Ex.* 236; *Verry v. Watkins*, 7 *C. & P.* 308).

The damages for seduction are generally very large and exemplary, and the court will seldom interfere with them on the ground of being excessive.

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**Limitation.** An action for seduction, being an action of trespass on the case, must be commenced within six years (see 21 *Jac.* 1, *c.* 16, *s.* 3).

## CHAPTER VIII.

## OF TRESPASS TO LAND AND DISPOSSESSION.

## SECTION I.

*Of Trespass quare clausum fregit.*

**Definition.** Trespass *quare clausum fregit* is a trespass committed in respect of another man's land, by entry on the same without lawful authority (3 *Steph. Comm.*, ch. 8).

**What constitutes.** RULE 38.—Every unauthorized entry upon or direct interference with another's land is a trespass, for which an action lies without proof of actual damage.

(1) Thus driving nails into another's wall, or placing objects against it, are trespasses (*Laurence v. Olve*, 1 *Stark.* 22; *Gregory v. Piper*, 9 *B. & C.* 591).

(2) So it is a trespass to allow one's cattle to stray on to another's land, unless there is contributory misconduct on his part, such as keeping in disrepair a hedge which he is bound by prescription or otherwise to repair (*Lee v. Riley*, 34 *L. J.*, *C. P.* 212); but if no such duty to repair exists the owner of cattle is liable for their trespasses even upon uninclosed land (*Boyle v. Tamin*, 6 *B. & C.* 337), and for all naturally resulting damage.

(3) Where one has authority to use another's land for a particular purpose any user going beyond the authorized purpose is a trespass. Thus, where the lord of a manor entitled by custom to convey under the plaintiff's land (by means of subterranean passages) minerals *got within the manor*, brought thereunder minerals from mines without the manor, it was held to be a trespass (*Eardley v. Lord Granville*, 24 *W. R.* 528).

(4) So if a person allow substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence in the keeping of them.

Thus one bringing or collecting water upon his land, does so at his peril, for if it escapes and injures his neighbour, he is liable, however careful he may have been (*Fletcher v. Rylands*, *L. R.*, 3 *H. L.* 330; *Smith v. Fletcher*, *L. R.*, 9 *Ex.* 64), unless the escape was caused by something quite beyond the possibility of his control, as the act of God or malice of a third party (*Nichols v. Marsland*, *L. R.*, 2 *Ex. Div.* 1); but where the water is naturally upon the land, the owner is only liable for negligence in keeping it.

**Distress Damage feasant.** It is convenient to mention here, a peculiar remedy of landowners for trespasses committed by cattle, viz., by seizing the animals whilst trespassing, and detaining them until compensation is made. This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case

of animals *feræ nature* reared by a particular person. In such cases the law, not recognizing any property in them, does not make their owner liable for their trespasses, but any person injured, may shoot or capture them while trespassing. Thus I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam v. Mockett*, 2 B. & C. 939, per Bayley, J.).

*Exceptions.* (1) *Retaking Goods.*—If one takes another's goods on to his land, the latter may enter and retake them (*Patrick v. Colerick*, 3 M. & W. 485).

(2) *Cattle.*—If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo v. Ridge*, 14 Cl. 74).

(3) *Distraining for Rent.*—So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Heane v. Reynolds*, 2 E. & B. 748); but he may not break open the outer door of a house, except to arrest under a warrant for felony, wounding, or breach of the peace (*Id.* 708). So in any case where the law will imply leave, an entry is lawful.

(4) *Reversioner inspecting Premises.*—A reversioner of lands may enter in order to see that no waste is being committed.

(5) *Escaping Danger.*—A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods (*Id.* 255).

(6) *Grantee of Easement.*—And the grantee of an easement may enter upon the servient tenement, in



order to do necessary repairs (*Taylor v. Whitehead*, 2 *Doug.* 745).

(7) *Public Rights*.—Land may be entered under the authority of a statute (*Beaver v. Mayor, &c. of Manchester*, 26 *L. J., Q. B.* 311), or in exercise of a public right, as the right to enter an inn, provided there is accommodation (*Dansey v. Richardson*, 3 *E. & B.* 1859).

(8) *Liberum Tenementum*.—Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands.

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**Trespassers ab Initio.** RULE 39.—(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*. (2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*, but must be punished for his abuse. (3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance, and not a mere non-

feasance (*Six Carpenters' case*, 1 Sm. L. C. 132).

Thus, in the above case, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a non-feasance and not a mis-feasance, was not sufficient to render them trespassers.

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**Possession necessary to maintain Trespass.** In order to maintain an action of trespass the plaintiff must be in the possession of the land, for it is an injury to possession rather than to title.

**RULE 40.**—The possession of land suffices to maintain an action of trespass against any person wrongfully entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*Jones v. Chapman*, 2 Ex. 821).

Thus a person entitled to the possession of lands or houses, cannot bring an action of trespass against a trespasser until he is in actual possession of them

(*Ryan v. Clark*, 14 Q. B. 65); but when he has once entered, he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson v. Radcliff*, 29 L. J., Q. B. 128; *Butcher v. Butcher*, 7 B. & C. 402).

**Onus of Proof of Title.** Sub-rule 1. — *The onus lies upon a primâ facie trespasser to show that he is entitled to enter upon land in another's possession* (*Brown v. Dawson*, 12 A. & E. 624; *Asher v. Whitlock*, L. R., 1 Q. B. 1).

**Surface and Subsoil in different Owners.** Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface (*Cox v. Mousley*, 5 C. B. 549), but he may for a trespass to the subsoil, as by digging holes, &c. (*Cox v. Glue*, 17 L. J., C. P. 162); so the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*Reyse v. Powell*, 22 L. J., Q. B. 305), unless the surface is disturbed thereby.

**Highways, &c.** Sub-rule 2. — *When one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege granted* (*Goodtitle v. Alder*, 1 Burr. 133; and *Northampton v. Ward*, 1 Wils. 114).

An action for trespasses committed upon it, as for instance, by throwing stones on to it or erecting a bridge over it, may be therefore maintained by the grantor (*Every v. Smith*, 26 *L. J.*, *Ec.* 345).

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**Joint Owners.** RULE 41.—Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other (see *Jacobs v. Senard*, *L. R.*, 5 *II. L.* 464).

(1) Among such acts may be mentioned the destruction of buildings (*Cresswell v. Hedges*, 31 *L. J.*, *Ec.* 49), carrying off of soil (*Wilkinson v. Hagarth*, 12 *Q. B.* 837), and expelling the plaintiff from his occupation (*Murray v. Hall*, 7 *C. B.* 441).

(2) But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds; for a coal mine is useless unless worked (*Job v. Potton*, *L. R.*, 20 *Eq.* 84).

**Party-walls.** There is also one other important case of trespass between joint owners, viz., that arising out of a party-wall.

Sub-rule.—*If one owner of the wall excludes the other owner entirely from his occupation of it, as by destroying it, or building upon it, for instance, he thereby commits*

*a trespass ; but if he pulls it down for the purpose of rebuilding it, he does not (Stedman v. Smith, 26 L. J., Q. B. 314 ; Cubitt v. Porter, 8 B. & C. 257).*

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**Continuing Trespasses.** RULE 42.—Where a trespass is permanent and continuing, the plaintiff may bring his action as for a continuing trespass, and claim damages for the continuation ; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer v. Cook*, 4 C. B. 236).

**Limitation.** All actions of trespass *quare clausum fregit* must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

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## SECTION 2.

### *Of Dispossession.*

**Definition.** Dispossession or ouster consists of the wrongful withholding of the possession of land from the rightful owner.

**Specific Remedy.** Before the Judicature Act, 1873, the remedy for this wrong was by an action of

ejectment for the actual recovery of the land, and since that statute it is by an action claiming the recovery of the land.

**Onus of Proof.** It is obvious that no reasonable system of law would throw upon the *prima facie* owner of land, the burden of proving his title upon every occasion that it was called in question; and therefore it is an elementary principle, that—

**RULE 43.**—The claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*Martin v. Strachan*, 5 T. R. 107).

Thus mere possession is *prima facie* evidence of title, until the claimant makes out a better one (*Sweetland v. Webber*, 1 Ad. & E. 119).

**Sub-rule 1.**—*But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible.*

Thus where one enclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher v. Whitlock*, L. R., 1 Q. B. 1).

**Jus Tertii.** A man who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore—

**Sub-rule 2.**—*The defendant may set up the right*

of a third person to the lands, in order to disprove that of the claimant (*Doe d. Carter v. Bernard*, 13 Q. B. 945).

But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher v. Whitlock*, *sup.*).

*Exceptions.* (1) *Landlord and Tenant*.—Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the tenancy, for a tenant cannot in general dispute his landlord's title (*Delaney v. Fox*, 26 L. J., C. P. 248), unless a defect in the title appears on the lease itself (*Saunders v. Merryweather*, 35 L. J., Ex. 115; *Doe d. Knight v. Smyth*, 4 M. & S. 347). But nevertheless he may show that his landlord's title has *expired*, by assignment, conveyance, or otherwise (*Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; *Walton v. Waterhouse*, 1 Wms. Saund. 418).

The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus where the claimant claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*Doe d. Oliver v. Powell*, 1 A. & E. 531; 3 A. & E. 188).

(2) *Servants and Licensees*.—The same principle is applicable to a licensee or servant, who is estopped from disputing the title of the person who licensed him (*Doe d. Johnson v. Baytop*, 3 A. & E. 188).



**Character of Claimant's Estate.** Rule 44.—The claimant's title may be either legal or equitable (*semble*), provided that he is equitably better entitled to the possession than the defendant.

Before the Judicature Act, 1873, it was a well-established rule that a plaintiff in ejectment must have the legal estate (*Doe d. North v. Webber*, 5 Scott, 189). It is submitted, however, that since that act, seeing that all branches of the High Court are to take cognizance of equitable rights, an equitable estate will be alone sufficient.

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**Limitation.** RULE 45.—No person shall bring an action for the recovery of land or rent but within twenty years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (3 & 4 Will. 4, c. 27, s. 2; *Brassington v. Llewellyn*, 27 L. J., Ex. 297), and after the 31st December, 1878, no such action shall be brought but within twelve years (37 & 38 Vict. c. 57, s. 1).

**Exceptions.** (1) *Disability*.—Where claimants are under disability, by reason of infancy, coverture, unsound mind, or absence beyond the seas, they must bring their action within ten years after such disability has ceased; provided that no action shall be

brought after forty years from the accrual of the right (sects. 16 and 17). *20 years allowed here.*

After the 31st December, 1878, disability by reason of absence beyond the seas is abolished, and six years and thirty years substituted for the above-mentioned periods of ten and forty years (37 & 38 Vict. c. 57, ss. 4, 3 and 5).

(2) *Acknowledgment of Title*.—When any person in possession of lands or rents shall have given an acknowledgment in writing, and signed by him, to the person entitled to such lands or rents, or to his agent, of his title, then the possession of the person by whom such acknowledgment shall have been made shall be deemed to be the possession of the person to whom such acknowledgment shall have been given, and the right of such last-mentioned person shall be taken to have accrued at and not before the date at which such acknowledgment was made, and the statute shall begin to run as from that date (*Ley v. Peter*, 27 L. J., Ex. 239).

(3) *Ecclesiastical Corporations*.—The period in the case of ecclesiastical and eleemosynary corporations is sixty years (3 & 4 Will. 4, c. 27, s. 29).

### Commencement of Period of Limitation.

Sub-rule 1.—*The right to maintain ejectment accrues at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner (see sect. 3), or in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time of which the same shall have become an estate or interest in possession, by*

*30 years, see sect. 29, 3 & 4 Will. 4.*

*as to profits or rent, see sect. 3.*

*as to future estate or interest, see sect. 3.*

*as to estate or interest in possession, see sect. 3.*

*the determination of the particular estate, notwithstanding the person claiming such land or rent, or some person through whom he claims, was at any time previously to the creation of the estate or estates which shall have determined, in the possession or receipt of the profits of such land, or receipt of the rents (37 & 38 Vict. c. 57, s. 2).*

It seems that discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (see *Smith v. Lloyd*, 23 L. J., Ex. 194; *Ad.*, Cap. VI. Sect. 2).

Thus where A. grants the surface of lands to B., and the mines thereunder to C., and C. does not enter for more than forty years, yet his right is not barred; for although he has not been in possession for forty years, yet there has been no adverse possession by another (see *Smith v. Lloyd*, 9 Ex. 571)

**Occupation of Servants.** As we have seen, the occupation of a servant is that of his master; therefore where a landowner allows his gardener to use a cottage rent free, such permission is not a discontinuance of possession, and no title can be gained by the gardener by twenty years' possession (*Ad.* 262); and so allowing another from kindness to occupy one's tenement, is not necessarily a discontinuance if one continues to exercise proprietary rights, as of repairing or planting, &c. (*Turner v. Doe*, 9 M. & W. 645).

**Continual Assertion of Claim.** Sub-rule 2.  
—No defendant is deemed to have been in possession of

*land, merely from the fact of having entered upon it ; and, on the other hand, a continual assertion of claim preserves no right of action (sects. 10 and 11).*

Therefore a man must actually bring his action within the time limited ; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period.

## CHAPTER IX.

## OF PRIVATE NUISANCES AFFECTING REALTY.

**Of Easements and Servitudes.** In order that the student may approach the subject of private nuisances with intelligence, it is in the first place necessary that he should understand the elements of the law relating to easements and servitudes.

**Definitions.** A servitude is a duty or service which one piece of land is bound to render, either to another piece of land, or to some person other than its owner. Where the servitude gives a mere right of user, without any right to take any of the mines or crops or other profits of the land, such right is called *an easement*. Where, on the other hand, it confers the right to any of the profits of the land, it is called a *profit à prendre*. Easements enjoyed in respect of the ownership of particular lands are called easements appurtenant, and the property to which the right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement. Easements enjoyed irrespectively of the ownership of land are called easements in gross.

**Creation of Servitudes.** Servitudes are either natural or conventional. Natural servitudes are such

as are necessary and natural adjuncts to the properties to which they are attached, and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription or grant; and in the case of profits *à prendre*, it is said that they can take their rise either by prescription or grant only, but this doctrine is now much modified, particularly in the case of commonable rights.

**Title to Servitudes.** As to what kind and what length of user will give a right to the various kinds of servitudes known to our law, and as to what servitudes are governed by the common law doctrines of prescription and what by the Prescription Act, all these are matters of real property law, for which I must refer the reader to works on that subject; but wherever I shall hereafter speak of a servitude imposed, or an easement or profit *à prendre* gained, by custom or prescription, I must be understood to mean *properly* imposed or gained, in accordance with the doctrines of the law in reference to such matters of title.

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**Definition.** “A private nuisance,” says Blackstone, “is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another not amounting to trespass.” It may either affect corporeal property or incorporeal rights.

**RULE 46.**—Every person should so use his

property and rights, as not to cause injury to another.

(1) Thus a man has an undoubted right to get minerals lying in and under his land, but in doing so he must not mine or excavate so near to the land of his neighbour, as to disturb such land and cause it to subside; for there is a natural servitude imposed upon every owner of land to afford lateral support to the adjacent land of his neighbour in its original state, and the withdrawal of such support is a nuisance (*Humphreys v. Brogden*, 12 Q. B. 739).



## SECTION I.

### *Nuisances to Corporeal Hereditaments.*

RULE 47.—Any act or omission of a person, whereby sensible injury is caused to the property of another, or whereby the ordinary physical comfort of human existence in such property is *materially* interfered with, is actionable.

(1) *Fumes*. Thus, in the case of *Tippings v. St. Helens' Smelting Co.* (L. R., 1 Ch. 66), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

(2) *Noisy Trade*. So, too, it was said, in *Crump v. Lambert* (L. R., 3 Eq. 409), that smoke unaccompanied with noise, or with noxious vapour, noise



alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

(3) And so, again, in *Walter v. Selfe* (4 D. G. & Sm. 322), Vice-Chancellor Knight Bruce said: "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" (and see per Kindersley, V.-C., in *Soltan v. De Held*, 2 Sim. N. S. 133; and per Selwyn and Giffard, L.JJ., in *Inchbald v. Robinson*, L. R., 4 Ch. 388.)

(4) *Noisy Entertainments*. So, too, the collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*Walker v. Brewster*, L. R., 5 Eq. 25; and see also *Inchbald v. Robinson*; and *Same v. Barrington*, L. R., 4 Ch. 388).

(5) So, it is apprehended, that the letting off of

rockets, and the establishment of a powerful band of music playing twice a week for several hours within one hundred yards of a dwellinghouse, are nuisances (*Ib.*)

(6) *Other Examples.* Other examples of nuisance to corporeal hereditaments are overhanging eaves from which the water flows on to another's property (*Battishill v. Reed*, 25 *L. J.*, *C. P.* 290); or overhanging trees, or pigstys, creating a stench, erected near to another's house (*Rosc.* 655); and it would seem that noisy dogs preventing the plaintiff's family from sleeping are nuisances, if the jury find that such discomfort is caused, although, where the jury find that no serious discomfort has arisen, the court will not interfere (*Street v. Guggell*, *Selwyn's N. P.*, 13th ed. 1090; and see *Rosc.* 655).

**Reasonableness of Place.** Sub-rule 1.—*Where an act is proved to interfere with the comfort of an individual, so as to come within the legal definition of a nuisance, it cannot be justified by the fact that it was done in a reasonable place (Bamford v. Turnley, 31 L. J., Q. B. 286). But what would constitute a nuisance in one locality may not be one in another (St. Helens' Smelting Co. v. Tippings, infra).*

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land, and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it.

And so, where the defendant made bricks upon his own land for the purpose of building thereon, and every precaution had been taken to prevent a nuisance, but a nuisance was actually caused to the plaintiff's dwellinghouse: here, although the jury found that the act complained of was merely a reasonable use of his own land by the defendant, and found a verdict for him, yet the majority of the court set that verdict aside (*Ib.*).

(2) In *St. Helens' Smelting Co. v. Tippings* (11 H. L. C. 650), Lord Westbury said: "In matters of this description, it appears to me that it is a very desirable thing, to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter,—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves,—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large.

If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances, the immediate result of which is sensible injury to the value of the property." And Lord Cranworth said (referring to a case which he had tried when a Baron of the Exchequer): "It was proved incontestably that smoke did come, and in some degree interfere with a certain person; but I said, 'You must look at it, not with a view to the question whether abstractedly that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields.'"

**Coming to the Nuisance.** Sub-rule 2.—*It is no answer to an action for nuisance that the plaintiff knew that there was a nuisance, and yet went and lived near it (Hole v. Barlow, 27 L. J., C. P. 208).*

Or in the words of Mr. Justice Byles in the above case, "It used to be thought that if a man knew that

there was a nuisance and went and lived near it he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that, if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwellinghouse.

Sub-rule 3.—*The right to carry on a noisome trade in derogation of the rights of another may be gained by custom, grant, or prescription, but not the right to carry on a trade which creates a public nuisance (see Elliotson v. Feetham, 2 Bing. N. C. 134; and see Flight v. Thomas, 10 A. & E. 590).*



## SECTION 2.

### *Nuisances to Incorporeal Hereditaments.*

#### **Disturbance of Easements of Support.**

RULE 48.—Subject to any express grant, reservation, covenant, or inconsistent right gained by prescription (*Rowbotham v. Wilson*, 8 H. L. C. 348; *Murchie v. Black*, 34 L. J., C. P. 337), it is well established, that where the surface of land belongs to one person, and the subjacent soil and minerals to another, the latter is burdened with a natural servitude to support the former (*Humphreys*

v. *Brogden*, 12 Q. B. 739), and also that the owner of land is entitled to the performance of a similar servitude of lateral support by the *adjacent* land (*Bonomi v. Backhouse*, 27 L. J., Q. B. 378; 28 *ib.* 378); but these easements only extend to the land in its natural and unencumbered state, and not with the additional weight of buildings upon it. In order to maintain an action for a nuisance affecting such an easement, some appreciable damage must be shown (*Smith v. Thackerah*, L. R., C. P. 564).

(1) *Humphreys v. Brogden* was an action by the occupier of the surface of land, for negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in the country, working the subjacent minerals, whereby the surface gave way. It was proved at the trial, that the plaintiff was in occupation of the surface, and the defendant, of the subjacent minerals, but there was no evidence how the occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendants had worked the mines carefully and according to custom, but without leaving sufficient support for the surface. Upon this finding, it was held that the plaintiff was entitled to have the verdict entered for him, for that of common right the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals



removes them, it is his duty to leave sufficient support for the surface in its natural state. And Lord Campbell, in delivering the judgment of the court, said : “ The right to *lateral* support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil ; if the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the mines belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left ; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals, for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which he is entitled from the adjoining surface close, it cannot be securely enjoyed as property, and under certain circumstances (as where the mineral strata approach the surface and are of great thickness) it



might be entirely destroyed. We likewise think, that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

(2) But where allotment commissioners, by their award, allotted land, so that some of the mines allotted to A. were situate under portions of the land allotted to B., and the persons interested executed the award, which contained a clause declaring that the proprietors agreed with each other and their heirs, that the land so allotted, should be lawfully held and enjoyed by the allottees without molestation, and without any mine owner being subject to any action for damages on account of working and getting the mines, or by reason that the lands might be "rendered uneven and less commodious to the occupiers thereof by sinking in hollows, and being otherwise defaced and injured where such mines should be worked," it was held, that this clause operated as a grant of a right to disturb the surface, and that a surface owner could not maintain any action for any such disturbance (*Rowbotham v. Wilson*, 8 H. L. C. 348, and see also *Eaton v. Jeffcock*, L. R., 7 Ex. 379).

(3) And in *Smith v. Thackerah* (L. R., 1 C. P. 564) Byles, J., said: "In actions for trespass, the trespass itself is a sufficient cause of action; but in actions for indirect injuries, like the present, the judgments of the House of Lords in *Bonomi v. Buckhouse* show

that there is no cause of action if there be no damage ; and I cannot distinguish between no appreciable damage to the land in its natural state, and no damage at all."

*Exception.*—Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support by purchasing the surface ; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity, in the ordinary way (*G. W. R. Co. v. Bennett, L. R.*, 2 *H. L.* 29). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the act (see *Dunn v. Birm. Canal Co., L. R.*, 8 *Q. B.* 42).

**Subterranean Water.** Sub-rule 1.—*An owner of land has no right at common law to the support of subterranean water (Popplewell v. Hodgkinson, L. R.*, 4 *Ex.* 248.

**Extra Weight of Buildings.** Sub-rule 2.—*The owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (Brown v. Robins, 4 H. & N. 186 ; Stroyan v. Knowles, Hamer v. Knowles, 6 H. & N. 454).*

**Support of Buildings.** RULE 49.—The right of support for buildings, whether lateral

or subjacent, and whether of the soil upon which they stand, or of the buildings themselves, must arise out of grant or prescription (*Partridge v. Scott*, 3 M. & W. 220; *Brown v. Robins*, 4 H. & N. 186; *N. E. R. Co. v. Elliott*, 29 L. J., Ch. 808).

(1) Thus, in *Partridge v. Scott*, it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant; if a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbours, unless he has some grant to that effect." Of course such grant may be express or implied (that is, prescriptive), and it would seem to be clear, that no prescriptive right of support for buildings can be gained where the natural right of support for the unincumbered surface has been given up (*Rowbotham v. Wilson*, *sup.*).

(2) So again, as between adjoining houses, there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbours' property (*Chandler v. Robinson*, 4 E. 163).

(3) But where, on the other hand, houses are built by the same owner, adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists,

by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards v. Rose*, 9 *Ex.* 218).

(4) And so it is said, that where adjoining houses are built by separate owners, a right of support may be gained by prescription (*Hide v. Thornborough*, 2 *C. & K.* 250; *sed quare*, *Salomon v. Vintners' Co.*, 4 *H. & N.* 585; *Angus v. Dalton*, *L. R.*, 3 *Q. B. Div.* 170).

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**Light and Air.** RULE 50.—There is no right, *ex jure nature*, to the free passage of light and air to a house or building (2 & 3 *Will.* 4, c. 71, s. 6); but such a right may be acquired, either by grant from the contiguous proprietors, or by prescription. Where such a right has been gained, no person will be allowed to interrupt such passage, unless he can show that, for whatever purpose the plaintiff might wish to employ the light, there would be no *material* interference with it by the alleged obstruction (*Yates v. Jack*, *L. R.*, 1 *Ch.* 295; and see per Best, C. J., in *Back v. Stacey*, 2 *C. & P.* 465, and *Dent v. Auction Mart Co.*, *L. R.*, 2 *Eq.* 245, and *Robson v. Whittingham*, *L. R.*, 1 *Ch.* 442).

(1) Thus in *Yates v. Jack*, where it was contended that the plaintiff was not entitled to relief,

because, for the purposes of his *then present* trade he was obliged to shade and subdue the light, and that therefore he suffered no actual damage, Lord Cranworth said: "This is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight, and an attentive consideration of the evidence of the trade witnesses on the one side, and on the other, has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business. I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the destruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognized by the statute 2 & 3 Will. 4, c. 71, is an absolute and indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me (which it does not) that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence, unless he had shown, that, for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (and see *Aynsley v. Glover*, *L. R.*, 18 *Eq.* 544, and 10 *Ch.* 283).

(2) And so, where ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction or damages (*Tapling v. Jones*, 11 *H. L. C.* 290; *Arcedeckne v. Kelk*, 2 *Giff.* 683; *Straight v. Burn*, *L. R.*, 5 *Ch.* 163).

(3) So, on the other hand, an enlargement of an ancient light, although it will not enlarge the right (*Cooper v. Hubbock*, 31 *L. J.*, *Ch.* 123), does not diminish or extinguish it; and, therefore, where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights (*Aynsley v. Glover*, *sup.*).

(4) The dominant tenement must be a building; and, therefore, a person who grants a lease of a house and garden, is not precluded (under the doctrine of not derogating from his own grant) from building on open ground retained by him adjacent to the house and garden, though, by so doing, the enjoyment of the garden, as pleasure ground, is interfered with, there being no obstruction of light and air to the house (*Potts v. Smith*, *L. R.*, 6 *Eq.* 311).

*Exception. Right over Grantor's Land.*—A man cannot derogate from his own grant.

(1) Therefore, if one grants a house to A., but keeps the land adjoining the house in his own hands, he cannot build upon that land so as to darken the windows of the house. And if he have sold the house to one and the land to another, the latter



stands in the grantor's place as regards the house (see per Bayley, J., *Canham v. Fisk*, 2 Cr. & J. 128; *Swansborough v. Corentry*, 9 Bing. 309; *Davies v. Marshall*, De G. & Sm. 557; *Freuen v. Phillips*, 11 C. B., N. S. 449).

(2) And so, where two separate purchasers buy two unfinished houses from the same vendor, and, at the time of the purchase, the windows are marked out, this is a sufficient indication of the rights of each, and implies a grant (*Compton v. Richards*, 1 Pr. 27; *Glave v. Harding*, 27 L. J., Ex. 286).

(3) Similarly, where two lessees claim under the same lessor, it is said that they cannot, in general, eneroach on one another's access to light and air (*Countts v. Gorham*, 1 M. & M. 396; *Jacomb v. Knight*, 32 L. J., Ch. 601); but it would seem that this statement of the law is too wide, as it is difficult to see what right the second lessee can have against the first, as no act of his can be a derogation from the second demise; and, indeed, it has been distinctly held, that where the grantor sells the land but retains the house, there is no duty upon the grantee of the land to abstain from building upon it, and the grantor cannot prevent him, for to do so would be, as much as in the preceding case, a derogation from his own grant (*White v. Bass*, 31 L. J., Ex. 283).

**Estoppel in case of Disturbance in pursuance of Licence.** Sub-rule.—*If the owner of the dominant tenement authorizes the owner of the servient tenement, either verbally or otherwise, to do an act of notoriety upon his land, which, when done, will affect or*



*put an end to the enjoyment of the easement, and such act is done, the licensor cannot retract, but must abide by the result.*

Thus where A. had a right to light and air across the area of B., and gave B. leave to put a skylight over the area, which B. did : it was held that A. could not retract his licence, although it was found that the skylight obstructed the light and air ; and Lord Ellenborough, C. J., said that at the trial he thought it very unreasonable, that after a party had been led to incur expense in consequence of having obtained a licence from another to do an act, and that licence had been acted upon, that other should be permitted to recall his licence and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books on the subject, and found himself justified by the case of *Webb v. Paternoster* (*Palmer*, 71), where Haughton, J., lays down the rule, that a licence executed is not countermandable, but only when it is executory (*Winter v. Brockwell*, 8 *East*, 309).

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**Disturbance of Watercourse. RULE 51.—**  
The right to the use of the water of a natural stream, belongs, *jure naturæ* and of right, to the owners of the adjoining lands, every one of whom has an equal right to use the water which flows in the stream ; and

consequently, no proprietor can have the right to use the water to the prejudice of any other proprietors (*Chasemore v. Richards*, 7 H. L. Ca. 349; *Wright v. Howard*, 1 S. & S. 203; *Dickenson v. Gr. Junc. Canal Co.*, 7 Ex. 299).

(1) Every riparian owner may reasonably use the stream, as, for instance, for drinking, watering his cattle or turning his mill, and other purposes, provided he does not thereby seriously diminish the stream. In short, it is a question entirely of degree, and depends upon the fact whether or not an injury is caused to the remaining proprietors by his user (see *Embrey v. Owen*, 6 Ex. 353).

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer, even though no actual damage has been sustained (*Wood v. Waud*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 369; *Crossley v. Lightowler*, L. R., 2 Ch. 478).

**Penning back Water.** Besides the natural right which every riparian proprietor has to the ordinary user of the water of a stream, and immunity from disturbance of that right by the riparian proprietors higher up the stream, he has also a right to have the water conveyed along the watercourse out of his lands, and immunity from disturbance of this right by riparian proprietors lower down the stream.

Sub-rule.—*If by means of impediments placed in or across a stream a riparian proprietor causes the stream to flood the lands of a proprietor higher up the stream, he will be liable for damages resulting therefrom; and equally if a higher proprietor collects water and pours it into the watercourse in a body, and so floods the lands of a proprietor lower down the stream, he will be liable for damage resulting therefrom* (*Chasemore v. Richards*, 7 H. L. C. 349; *Sharpe v. Hancock*, 8 Sc. N. R. 46).

*Exception. Prescriptive Rights.*—Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*Acton v. Blundell*, 12 M. & W. 353; *Carlyon v. Larering*, 1 H. & N. 784; 26 L. J., Ex. 251); but where a man has gained a right to use a stream in derogation of the rights of the other riparian proprietors (as, for instance, by fouling it), he must not use such acquired right to the injury of his own grantees, for that would be derogating from his own grant (*Crossley v. Lightowler*, L. R., 2 Ch. 478).

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**Artificial Watercourses.** RULE 52.—An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give all the rights which a riparian proprietor would have had if it had been a natural stream (per Wight-

man J., *Sutcliffe v. Boothe*, 32 L. J., Q. B. 136).

(1) Where a loop had been made in a stream, which loop passed through a field A., it was held that the grantee of A. became a riparian proprietor in respect of the loop (*Nuttall v. Bracewell*, L. R., 2 Ex. 1).

(2) A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the River Irwell, and the other passed into a farm yard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood and thence down to the Irwell, connected the watering trough with reservoirs which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867, he conveyed the mill with all water rights to the plaintiff. In an action brought by the plaintiff against a riparian owner on the stream above the point of division for obstructing the flow of water, it was held that the plaintiff was entitled to maintain the action (*Holker v. Porrit*, L. R., 8 Ex. 107; L. R., 10 Ex. (Ex. Ch.) 59).

(3) But where the watercourse is merely put in for a temporary purpose, as for drainage of a farm, or the carrying off of water pumped from a mine, a neighbouring landlord, benefited by the flow from the drain or stream, cannot sue the farmer or mine

owner for draining off the water, even after fifty years' enjoyment (*Greatrex v. Hayward*, 8 *Ex.* 291).

### **Discharging Water on to another's Land.**

A right to discharge water on to another's land may be acquired by grant or prescription, but it is a rule that—

RULE 53.—A person having a right to discharge pure water on to the land of another, has no right to discharge water in a polluted state (*Magor v. Chadwick*, 11 *A. & E.* 571).

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**Private Rights of Way.** There is no natural servitude of a private right of way. The only right of way which calls for remark in an elementary work of this kind, is that which is said to arise by necessity; that is to say,—

RULE 54.—Where one grants land to another, and there is no access to such land except through other land of the grantor, the law gives to the grantee a private right of way over the latter (*Gayford v. Moffat*, *L. R.*, 4 *Ch.* 133).

A way of necessity is really a way by grant, for there is no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant (1 *Wms. Saund.* 323a; *Proctor v. Hodgson*, 24 *L. J.*, *Ex.* 195).

(1) Thus, as is said by Mr. Sergeant Williams (1 *Wms. Saund.* 321, *n.* 6), “Where a man having a close surrounded with his own land, grants the close to another in fee, for life, or for years, the grantee shall have a way to the close over the grantor’s land as incident to the grant, for without it he cannot derive any benefit from the grant.

(2) And so again, where one having two fields, the only access to one of which lies through the other, sells this latter, the law reserves to him a right of way over it (*Pennington v. Galland*, 22 *L. J., Ex.* 349).

Sub-rule.—*When the necessity ceases the right ceases, but the right revives again when the necessity revives* (*Holmes v. Goring*, 2 *Bing.* 76; *Pearson v. Spencer*, 1 *B. & S.* 584).

Therefore, when by a subsequent purchase a man can approach his land without going over that of his neighbour, his right to do so ceases; but upon the re-sale of such subsequent purchase the right revives.

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**Alteration in Object.** RULE 55.—A right of way is extinguished by a substantial alteration in the original object of the grant of the way.

Thus, where the way is granted to an open space of land, described in the grant as “now used as a wood house,” the grantee, although not bound to

continue to use it as a wood house, cannot use the way if he alters the mode of user of the piece of land.

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**Disturbance of Common.** This happens when any act is done by which the right of another to his common is incommoded or diminished (*Steph. Comm.*, bk. v. c. viii.). There are three different conditions under which this wrong may be suffered, viz.—

(1) Where the wrongdoer having no right of common, puts beasts on the land; or, having such right, puts uncommonable ones on to it.

(2) Where a commoner surcharges or puts more beasts on the common than he is entitled to put; and

(3) Where the wrongdoer encloses or obstructs the common.

**Prescription.** RULE 56.—The lord may by prescription put a stranger's cattle into the common, and also by a like prescription for common appurtenant cattle that are not commonable may be put into the common (*Steph. Comm.*, bk. v. c. viii.).

If, however, no such prescription exists the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.



**Surcharging.** This generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant on the estate; or where it is appurtenant, that is to say, where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land in respect of which the common is appurtenant is capable of supporting through the winter if cultivated for that purpose (*Can v. Lambert, L. R., 1 Ex. 168*). A common in gross can only arise from express grant to a particular person and his heirs, and, having no connection with his land, the number of commonable beasts, unless expressly limited by the grant, is indefinite.

**RULE 57.**—Common appendant and appurtenant being limitable by law, a commoner surcharging the common commits a wrong for which the lord may distrain the beasts surcharged or bring an action, and any commoner may also bring an action, whether the surcharger may be the lord or another commoner (*Steph. Comm., bk. v. c. viii.*).

**Obstruction.** The common being free and open to all having commonable rights over it, it follows that—

**RULE 58.**—When the owner of the land or

some other person so encloses or otherwise obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*Steph. Comm.*, bk. v. c. viii.; and see *City Commissioners of Sewers v. Glass*, *L. R.*, 19 *Eq.* 134).

This may happen either by enclosing the land or ploughing it up, or driving off the cattle, or making a warren and so stocking it that the rabbits eat up all the herbage. The lord may, however, lawfully make a warren if the rabbits be so kept under as not to occasion this wrong (*Ibid.*; and *Bullen v. Langdon*, *C. Eliz.* 876).

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**Other Disturbances.** There are certain other kinds of disturbance, for which I must refer you to the larger works.

Such are disturbance of patronage, pews, franchise, and tenure.

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**Remedy by Abatement.** The law gives a peculiar remedy for nuisances by which a man may right himself. This remedy is called abatement, and consists in the removal of the nuisance.

**RULE 59.**—A nuisance may be abated by the party aggrieved thereby, so that he com-

mits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*Steph. Comm.*, bk. v. c. i.); but a man cannot enter a neighbour's land to prevent an apprehended nuisance (*Id.* 188).

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may, after notice and request to him to remove it, enter and pull it down (*R. v. Rossell*, 2 *Salk.* 459); but this notice should always be given (*Davies v. Williams*, 16 *Q. B.* 556).

(2) But where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris v. Baker*, 1 *Roll. Rep.* 393, *fol.* 15).

(3) Obstructions to watercourses may be abated by the party injured, whether by diminution or flooding (*Roberts v. Rose*, *L. R.*, 1 *Ex.* 82).

(4) A commoner may abate an encroachment on his common, such as a house (*Davies v. Williams*, *supra*), or fence obstructing his right (*Mason v. Caesar*, 2 *Mod.* 66); but he cannot abate a warren however great a nuisance, but must appeal to a court of justice (*Cooper v. Marshall*, 1 *Burr.* 226).

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**Remedy of Reversioners. RULE 60.**—Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Bedingfield v. Onslow*, 1 *Saund.* 322).

(1) Thus opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the mere alteration of property may be an injury (*Young v. Spencer*, 10 *B. & C.* 145, 152).

(2) So if a trespass be accompanied with an obvious denial of title, as by a public notice, that would probably be actionable (see judgment, *Dobson v. Blackmore*, 9 *Q. B.* 991).

(3) So the obstruction of an incorporeal right, as of way, air, light, water, &c., may be an injury to the reversion (*Kidgell v. Moore*, 9 *C. B.* 364; *Met. Ass. v. Petch*, 27 *L. J., C. P.* 330; *Greenslade v. Halliday*, 6 *Bing.* 379).

Sub-rule 1.—*The action will not lie for a trespass or nuisance of a mere transient and temporary character* (*Baxter v. Taylor*, 4 *B. & Ad.* 72).

Thus a nuisance arising from noise or smoke will not support an action by the reversioner (*Mumford v. O. W. & W. R. Co.*, 26 *L. J., Ex.* 265; *Simpson v. Savage*, 26 *L. J., C. P.* 50).

Sub-rule 2.—*Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant* (*Kidgell v. Moore*, *sup.*).

## CHAPTER X.

## OF FRAUD AND DECEIT.

A VERY important class of wilful wrongs are those arising out of fraud and deceit.

RULE 61.—An action for deceit will lie (1) When the defendant has by a fraudulent misrepresentation, induced another to act, and, so acting, he has been injured or damaged (*Pasley v. Freeman*, 2 Sm. L. C. 71): and (2) where owing to such fraudulent representation made by him to another, some third person has been induced to act, and, so acting, he has been injured or damaged; provided that such false representation was made with the direct intent that such third person should act in the manner that occasioned the injury or loss (*Langridge v. Levy*, 2 M. & W. 519).

(1) So, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith

thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*Dobell v. Stevens*, 3 B. & C. 623).

(2) Similarly, where a gunmaker sold a gun to B., for the use of C., fraudulently warranting it to be sound, and the gun burst while C. was using it, and he was thereby injured: Held, that C. might maintain an action for false representation against the gunmaker (*Langridge v. Levy*, *sup.*).

**Meaning of the Expression “Fraudulent.”** It is now clearly settled that in order to make a person liable for a fraudulent misrepresentation he must have been guilty of some moral wrong. In other words, legal fraud, unaccompanied by moral fraud, will fail to support an action of this description (*Collins v. Evans*, 5 Q. B. 820; *Taylor v. Ashton*, 11 M. & W. 401). But though it is necessary that the defendant, in making the false statement, should have committed some moral turpitude, it is by no means essential to show that he knew, as a fact, what he stated was false. “I conceive,” remarks Maule, J., in *Evans v. Edmunds*, 13 C. B. 786, “that if a man, *having no knowledge whatever on the subject*, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is, in law, guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts.” Or again, in *Taylor v. Ashton* (11 M. & W. 401), Parke, B., remarks, “There may, undoubtedly, be a fraudulent representation, if

made dishonestly, of that which the party does not know to be untrue if *he does not know it to be true.*”

Sub-rule 1.—*A defendant has acted fraudulently and is liable—*

(1) *If he has made the misrepresentation not knowing it to be true, or without reasonable and probable grounds on which to suppose it to be true, and it is not necessary to show that he knew it to be untrue; or*

(2) *If, when he made the mis-statement, he made it for the purpose of defrauding the plaintiff, or with a view to secure some benefit to himself.*

The fraudulent purpose is absolutely essential (*Thom v. Bigland*, 8 *Ec.* 725). If it were otherwise, as remarked in *Bailey v. Walford*, 9 *Q. B.* 197, 208, “a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit.”

**A Principal's Liability for the Fraud of his Agent.** Sub-rule 2.—*Though, as above stated, it is now settled, that the defendant, in actions of deceit, must have been guilty of moral fraud, it has also been held, after much conflict of opinion, that the fraud of the agent is, in law, the fraud of the principal.*

(1) Thus, a plaintiff having for some time, on a guarantee of the defendants', supplied J. D., a customer of theirs, with oats on credit for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants'



manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of 1,227*l.*; the government money, amounting to 2,676*l.*, was received by J. D. and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of 2,676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation: Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so; secondly, that the defendants would be liable for such fraud in their agent (*Barwick v. English Joint-Stock Bank, L. R., 2 Ex. 259*).

(2) An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested, and A. was compelled to pay the bill:

Held; that A. could recover from the bank the amount so paid. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purposes of pleading, as that of the principal (*Mackay v. Commercial Bank of New Brunswick, L. R., 5 P. C. 394*).

### **Fraudulent Character must be in Writing.**

Sub-rule 3.—*No action lies against a person for making a false representation of the conduct, credit, ability or dealings of another, with intent to procure credit, money, or goods for such person, unless such false representation is in writing, signed by the defendant* (9 Geo. 4, c. 14, s. 6).

Under this act, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, and not by an agent (*Swift v. Jewsbury (P. O.) and Goddard, L. R., 8 Q. B. 244; 9 Q. B. (Ex. Ch.) 301*). For the same reason, one partner cannot bind his co-partners, even though he has express authority to sign (*Mason v. Williams, 28 L. T., N. S. 232*).

**Fraudulent Concealment and Non-disclosure.** RULE 62.—The mere fact of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge,

he would not buy (see Brett, L. J., in *Ward v. Hobbs*, L. R., 3 Q. B. D. 162).

(1) Thus the defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease. They were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs which became infected. Some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease: Held, that the defendant was not liable for the loss sustained by the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease (*Ward v. Hobbs*, *sup.*).

(2) So where a vessel was sold "with all faults," but the seller knew of a latent defect, but made no representation in fact, nor did anything to conceal or to endeavour to conceal the defect: Held, that his knowledge of the latent defect gave no right to the purchaser to complain of the purchase (3 *Camp.* 154).

See also *Peck v. Gurney* (L. R., 6 H. L. 403), in which case Lord Cairns remarks: "I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-

disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misrepresentation of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

(3) "Even if the vendor was aware," observes Lord Blackburn, "that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor" (*Smith v. Hughes*, *L. R.*, 6 *C. P.* 597).

*Exception.* But when the vendor does something actively to deceive the vendee, as where he endeavours to conceal the defect by some artificial means, or where he makes a false representation, then an action will lie.

(1) The vendor of a house, knowing of a defect in one of the walls plastered it up and papered it over, in consequence whereof the vendee was deceived as to its true condition, and was damnified: Held, the purchaser could maintain an action of deceit (*Pickering v. Dawson*, 4 *Taunt.* 785).

(2) Again, where a ship was to be taken "with all faults," and the vendor knew of a latent defect in her, and in order to escape its detection, concealed it and made a fraudulent representation of her condition: Held, that an action of deceit would lie (*Schneider v. Heath*, 3 Camp. 506).

**Expression "With all Faults."** Sub-rule. — *This expression will not protect the vendor where he has been guilty of fraud either by making a fraudulent representation, or by doing something to prevent the vendee from discovering a defect.*

"A stipulation that the thing sold is to be taken with all faults, and without allowance for any defect, error, or misdescription, will protect the vendor from all unintentional mistakes, misstatements, and misdescription, but not from the consequence of any wilful deception" (*Add. on Torts*, p. 852).

## CHAPTER XI.

## OF TRESPASS TO AND CONVERSION OF CHATTELS.

**General Rule.** RULE 63.—Every direct forcible injury, or act disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass, whether the injury be committed by the defendant himself or by some animal belonging to him; and if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner (as by taking, using or destroying them), it then becomes a wrongful conversion (*Fouldes v. Willoughby*, 8 M. & W. 540; *Burroughs v. Bayne*, 29 L. J., Ex. 185).

(1) Thus beating or otherwise ill-using the plaintiff's dogs or other animals is a trespass (*Dand v. Sexton*, 3 T. R. 37). And so where the defendant's horse injured the plaintiff's mare, by biting and kicking her through the fence separating the plaintiff's land from the defendant's, it was held that there was a trespass by the act of the defendant's horse, for which the defendant was liable, apart from any question of negligence on the part of the de-

fendant (*Ellis v. Loftus Iron Co., L. R., 10 C. P. 10*).

(2) The innocence of the trespasser's intentions is immaterial. Thus where the sister-in-law of A., immediately after his death removed some of his jewelry from a drawer in the room in which he had died to a cupboard in another, in order to insure its safety, and the jewelry was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass in the absence of proof that it was reasonably necessary (*Kirk v. Gregory, L. R., 1 Ex. D. 55*).

(3) An illegal distress, or any other mode of seizing and taking goods without due authority, is a trespass; as, for instance, the taking away a tombstone erected by the plaintiff (*Spooner v. Brewster, 3 Bing. 136*).

(4) So if one lawfully having the goods of another for a particular purpose destroy them, he is guilty of trespass and conversion (*Cooper v. Willomat, 1 C. B. 692*).

(5) So if a sheriff sells more goods than are sufficient to satisfy an execution, he will be liable for a conversion of those in excess (*Aldred v. Constable, 6 Q. B. 381*).

(6) So if A. starts a hare in the ground of B., and hunts it and kills it there, it is a trespass; for so long as the hare is upon B.'s land it is B.'s property (*Sutton v. Moody, 1 Ld. Raym. 250*). So rabbits bred in a warren are the property of the breeder so long as they stay in his land, but not after they have left it (*Hudesden v. Gryssel, Cro. Jac. 195*).

(7) And so when the plaintiff granted a lease to the defendant, excepting the trees and herons build-



ing therein, and the defendant shot the herons, the plaintiff was held entitled to recover; for, although herons are *feræ naturæ*, and incapable whilst free of being absolutely owned, yet, so long as they remained in the trees of the plaintiff they were his property (*Bishop of London's case*, 14 Hen. 8).

(8) The purchase of goods, which the vendor had no right to sell, accompanied by taking possession, is a conversion by the purchaser as against the real owner, even though the purchaser was unaware that the vendor had no authority; for want of intention is no excuse (*Hilbery v. Hatton*, 33 L. J., Ex. 190).

*Exceptions.* (1) *Plaintiff's Fault*.—It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act.

Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*Slater v. Swann*, 2 St. 892). So, if his cattle or goods trespassing on my land get injured, he has no remedy (*Turner v. Hunt, Brownl.* 220); unless I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*King v. Rose*, 1 Freem. 347).

So, if a man wrongfully takes my garment and embroiders it with gold, I may retake it; and if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong (Coke, C. J., in *Ward v. Eyre*, 2 Bulstr. 323). And likewise if one takes away my carriage, and has it painted anew without

my authority, I am entitled to have the carriage without paying for the painting (*Hiscox v. Greenwood*, 4 *Esp.* 174).

(2) *Defence of Property*.—A trespass committed in defence of property is justifiable.

Thus a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*Wells v. Head*, 4 *C. & P.* 568).

But a man cannot justify shooting a dog on the ground that it was chasing animals *feræ naturæ* (*Vere v. Lord Cawdor*, 11 *East*, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Reade v. Edwards*, 34 *L. J., C. P.* 31, and *Ad.* 359).

(3) *Self-defence*.—A trespass committed in self-defence is justifiable.

Thus to kill another's dog whilst in the act of attacking the defendant is justifiable, but not otherwise.

(4) *In exercise of Right*.—A trespass committed in exercise of a man's own rights is justifiable (*Ad.* 308).

Thus, seizing goods of another under a lawful distress for rent or damage feasant is lawful.

(5) *Legal Authority*.—Due process of law is a good justification.

Thus to take goods under a *ca. sa.*, or to destroy or seize goods under the order of a court, is justifiable.

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**Possession.** RULE 64.—To maintain an action for trespass or conversion, the plaintiff must be the person in actual or constructive possession of the goods (*Smith v. Miller*, *T. R.* 480).

Thus a reversioner cannot sue a third party for *trespass or conversion* (*Bradley v. Copley*, 1 *C. B.* 685): conversely, the person in possession of a chattel, although not the owner, may maintain trespass in respect of it, *ex. gra.*, the master of a ship (*Moore v. Robinson*, 2 *B. & Ad.* 817).

**Possession follows Title.** Sub-rule 1.—*A legal right to the possession of personalty draws to it the possession* (*Balme v. Hutton*, 9 *Bing.* 477).

(1) Thus where the person in temporary possession (as a carrier) delivers my goods to the wrong person, then, as the immediate right to the possession of them becomes again vested in me, so the law immediately invests me with the possession, and I can maintain an action for them against either the bailee or the purchaser (*Cooper v. Willomat*, 1 *C. B.* 672; *Wild v. Pickford*, 8 *M. & W.* 443).

(2) So where a bailee became bankrupt, and his assignees sold the goods, the bailor was held entitled to sue them for a conversion (*Fenn v. Bittleston*, 7 *Ex.* 152).

(3) *Sale of Property under Lien.* And so when by a sale of goods the property in them has passed to the purchaser, subject to a mere lien for the price, if the vendor resells and delivers them to another he

will be liable for conversion, but in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*Page v. Edulgee*, *L. R.*, 1 *C. P.* 127; *Martindale v. Smith*, 1 *Q. B.* 389).

(4) And on the same principle an administrator may maintain an action for trespass to goods, which trespass was committed previously to his grant of letters of administration (*Thorpe v. Smallwood*, 5 *M. & G.* 760).

(5) So a trustee having the legal property may sue in respect of goods, although the actual possession may be in his cestui que trust (*Wooderman v. Baldock*, 8 *Taunt.* 676).

**What Possession suffices.** Sub-rule 2. — *Any possession is sufficient to sustain an action for trespass or conversion against a wrongdoer.*

(1) Thus in the leading case of *Armory v. Delamirie* (1 *Sm. L. C.* 315), it was held that the plaintiff, the finder of a jewel, could maintain an action of trover against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner.

(2) So also in *Elliott v. Kempe* (7 *M. & W.* 312), it was laid down that the fact of possession is *prima facie* evidence of the right to possession, and therefore sufficient to maintain trespass against a wrongdoer who cannot show a better title, or authority under a better title.

Therefore a defendant cannot set up a *jus tertii*

against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may set up a *jus tertii*; for constructive possession depends upon a good title, and if the title be bad there can be no constructive possession (see *Leake v. Loreday*, 4 M. & G. 972).

**Reversioner's Remedy.** Sub-rule 3. — *The person entitled to the reversion of goods may maintain an action of trespass on the case for any permanent injury done to them (Tancred v. Allgood, 28 L. J., Ex. 362; Lancas. Wuggon Co. v. Fitzhugh, 30 L. J., Ex. 231).*

Thus where the plaintiff, the owner of a barge, let it to A., and whilst in A.'s possession and during the continuance of the lease it was permanently injured by a third party (the defendant): it was held that an action lay by the plaintiff, although he could not have sued for conversion (*Mears v. L. & S. W. R. Co.*, 11 C. B., N. S. 854).

In the same case, Williams, J., says: "It is fully established that in the case of a bailment not for reward, either the bailor or bailee may bring an action for an injury to the thing bailed; but in the case of a hiring the owner cannot bring trover, because he has temporarily parted with the possession. It seems to me, however, clear that though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that where there is a permanent injury

the owner may maintain an action against the person whose wrongful act has caused that permanent injury."

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**Joint Owners.** RULE 65.—A joint owner can only maintain trespass or conversion against his co-owner when the latter has done some act inconsistent with the joint-ownership of the plaintiff (2 *Wms. Saund.* 470; and see *Jacobs v. Senard*, *L. R.*, 5 *H. L.* 464).

(1) Thus a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby.

(2) But a mere sale of them by one joint owner would not be a conversion, for he could only sell his share in them. Unless, indeed, he sold them in market overt, so as to vest the whole property in the purchaser, in which case it would be a conversion (*Mayhew v. Herrick*, 7 *C. B.* 229).

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**Trespass ab initio.** RULE 66.—If one, lawfully taking a chattel, but not absolutely, abuses or wastes it, he renders himself a trespasser ab initio (*Oxley v. Watts*, 1 *T. R.* 12).

Thus if one find a chattel it is no trespass to keep it as against all the world except the right owner,

but if one spoil or damage it, and the right owner eventually claim it, then the subsequent damage will revert back, and render the original taking unlawful (*Ibid.*). But, as against the true owner, a man commits no conversion by keeping the goods until he has made due inquiries as to the right of the owner to them (*Vaughan v. Watt*, 6 M. & W. 492; and see *Pillott v. Wilkinson*, 34 L. J., Ex. 22).

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**Remedies.** There were formerly four forms of remedy for the preceding trespasses by action, and one peculiar one by act of the person injured called—

**Recaption.** RULE 67.—When any one has deprived another of his goods or chattels, the owner of the goods may lawfully reclaim and take them wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace (*Bl. Comm.*).

Thus if, for instance, my horse is taken away, and I find it in an inn or on a common, or at a fair, I may retake it, but (unless it was feloniously stolen) I cannot break open a private stable for the purpose (*Ibid.*; and *Higgins v. Andrews*, 2 Roll. R. 55).

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**Remedies by Action.** By the effect of the Judicature Acts the distinction in form between actions has been finally abolished, so that the former



actions of trespass, which lay for an interference with goods, trover, which lay for a wrongful conversion of goods, and detinue, which lay for a wrongful detainer of goods, no longer exist, although that of replevin is, at all events in its inception, still different from all other actions. It will, therefore, be convenient to consider the ordinary form of action first, and the action of replevin by itself afterwards.

**Ordinary Remedy by Action. RULE 68.**

—Wherever there has been a trespass or wrongful conversion or a wrongful detention of a chattel, an action lies at the suit of the person injured; and where the defendant still retains the chattel the court or a judge has power to order that execution shall issue for return of the specific chattel detained, without giving the defendant the option of paying the assessed value instead; and if the chattel cannot be found, then, unless the court or judge shall otherwise order, the sheriff shall distrain the defendant by all his goods and chattels in his bailiwick till the defendant renders such chattel (Com. Law Proc. Act, 1854, s. 78).

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**Replevin.** This remedy is, practically speaking, applicable only in cases of goods unlawfully distrained.

**RULE 69.**—The owner of goods distrained is entitled to have them returned upon giving such security as the law requires to prosecute his suit, without delay, against the distrainer, and to return the good if a return should be awarded (see 19 & 20 Vict. c. 108, ss. 63—66).

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes their return on the plaintiff's giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course it is also made a condition of the replevin bond that the rent or damage in respect of which the distress was made exceeds 20*l.*, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (19 & 20 Vict. c. 108, s. 95).

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**Waiver of Tort.** **RULE 70.**—When a conversion consists of a wrongful sale of goods the owner of them may waive the tort, and sue by a count for money had and received for the price which the defendant obtained

for them (*Lamine v. Dorrell*, 2 *L. Raym.* 1216; *Oughton v. Seppings*, 1 *B. & Ad.* 241).

(1) Thus where the sheriff took in execution the goods of a bankrupt which had vested in the assignees by reason of a previous act of bankruptcy, and sold them after notice of the act of bankruptcy, the assignees were held entitled to recover the price obtained for the goods by the sheriff as money paid to their use (*Notley v. Buck*, 8 *B. & C.* 160).

(2) And so where some stock of the plaintiff's was sold by a member of the defendant's firm under a forged power of attorney, and the firm received the money for which it had been sold, it was held that the plaintiff could recover the money as paid to his use (*Marsh v. Keating*, 1 *Bing.*, *N. C.* 198).

Sub-rule.—*But by waiving the tort the plaintiff estops himself from recovering any damages for the wrong.*

Thus he cannot claim the money received under a wrongful sale, and also claim damages in respect of the tort itself (*Brewer v. Sparrow*, 7 *B. & C.* 310).

**Stolen Goods.** RULE 71.—If any person who may have stolen property is prosecuted to conviction by or on behalf of the owner, the property shall be restored to the owner, and the court before whom such person shall

be tried shall have power to order restitution thereof (24 & 25 Vict. c. 96, s. 100).

Therefore, even if the goods were sold by the thief in market overt (which at common law gives an indefeasible title to the purchaser), yet by this section they must be given up to the original owner; and where no order is made under the act, yet the act reverts the goods and gives the owner a right of action for them (*Scattergood v. Silvester*, 19 *L. J.*, *Q. B.* 447).

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**Limitation.** All actions for trespass to or conversion or detainer of goods and chattels, must be commenced within six years next after the cause of action arose.

## CHAPTER XII.

OF INFRINGEMENTS OF TRADE MARKS AND PATENT  
AND COPYRIGHT.

**Class of Rights.** Besides injuries to person, reputation, liberty, or property, there are also injuries which cannot, perhaps, strictly speaking, be ranged under any of these heads.

There are very many rights belonging to individuals of which it is impossible to treat in any single work, much less in a work of this kind; and therefore of these it is sufficient to say, that where they are infringed the law will always supply a remedy, in accordance with the maxim *ubi jus ibi remedium est*.

But there are three instances of rights so important that they demand some special elementary notice to be taken of them, even in a small work. Such are the rights incident to a trade mark, patent right, and copyright.



## SECTION 1.

*Imitation of Trade Marks.*

**Definition.** RULE 72.—A trade mark is the symbol by which a man causes his goods

or wares to be identified and known in the market, and must now consist of one or more of the following essential particulars, namely:—

A name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or

A written signature or copy of a written signature of an individual or firm, or a distinctive device, mark, heading, label or ticket; or

A combination of any one or more of the above with any letters, words or figures, or combination of letters, words or figures; or

Any special and distinctive word or words, or combination of figures or letters used as a trade mark previously to the 13th August, 1875 (38 & 39 Vict. c. 91, s. 10).

**Nature of the Title to Relief.** Whether the relief in the case of infringements of trade mark is founded upon a right of property in the mark, or on fraudulent misrepresentation, is by no means so clear as could be desired. It would seem that the tendency of the older cases was to hold that the jurisdiction was founded on fraud; but in the case of the *American Cloth Co. v. American Leather Cloth Co.* (33 L. J., Ch. 199), Lord Westbury said, "The true principle seems to be that the jurisdiction of the court in the protection given to trade marks is founded upon

property," not of course property in the symbol itself, but in the sole application of the symbol to the particular class of goods of which it constituted the trade mark; and this view was followed in *Millington v. Fox* (3 M. & C. 338), and in *Harrison v. Taylor* (11 Jur., N. S. 408). On the other hand, in *The Singer Machine Manufacturers v. Wilson* (L. R., 2 Ch. D. 434), the Master of the Rolls scouted the idea of there being any property in a trade mark, and founded the jurisdiction wholly upon deception. This view was supported by the court of appeal (L. R., 2 Ch. D. 451), but upon the case being brought before the House of Lords at the end of 1877, Lord Cairns said, "That there have been many cases in which a trade mark has been used, not merely improperly but fraudulently, and that this fraudulent use has often been adverted to and made the ground of the decision, I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . The action of the court must depend upon the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them, and perseveres in infringing upon them, as culpable as if he had originally known them." Lord Blackburn, however, was more guarded in his language, and said, "I prefer to say no more, than that I am not as yet prepared to assent, either



to the position that there is a right of property in a name, or, what seems to me nearly the same thing, to assent, to its full extent, to the proposition, that it is not necessary to prove fraud." It is, therefore, somewhat difficult to see upon what ground the court gives relief, but it is humbly suggested, that, as distinguished from an actual property in a trade mark, there is a negative property or right of preventing any other person from using it in such a manner as to cause a probability of such latter person's goods being mistaken for those of the person who has used the trade mark, but that such wrongful user, without fraud, is no ground for obtaining damages. Whether, however, this is the true reason or not, it seems to be well established that,—

RULE 73.—Where a person has a definite mark, he is entitled to an injunction to restrain any other person from using any mark of such a degree of similarity, as either actually to have deceived, or such as obviously might deceive, the public, although there might be no intention to deceive (see per Lord Cairns in *Singer Machine Manufacturers v. Wilson*, *sup.*, and per Vice-Chancellor Wood in *Welch v. Knott*, 4 K. & J. 747). But he will not be liable to an action for damages, or (query) to render an account of his profits, unless he has acted fraudulently

(see per Lord Blackburn in *Singer Manufacturers v. Wilson*, *sup.*).

1. Thus, in *Harrison v. Taylor* (*sup.*), the plaintiff had adopted as his trade mark the figure of an ox, on the flank of which was printed the word "Durham," the names of the plaintiff being printed above the word "Durham," and the word "mustard" below. The defendants, who were also mustard manufacturers, used a similar ox, but without the words "Durham" and "mustard," but having his name Taylor printed below. The court, however, held, that the mark was so similar as to be likely to deceive intending purchasers; and, although the defendant did not know that he had infringed the plaintiff's mark, granted an injunction to restrain him from further using it.

(2) So, in *Cocks v. Chandler* (*L. R.*, 11 *Eq.* 446), where the inventor of a sauce sold it in wrappers, whereon it was called "The Original Reading Sauce," and the defendant brought out a sauce which he labelled "Chandler's Original Reading Sauce," he was restrained from doing so for the future.

(3) So where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce; and has acquired a reputation in the market by a name, not merely descriptive of the article; B. will not be permitted to sell a similar article under the same name (*Braham v. Bustard*, 1 *H. & M.* 449).

(4) And so also in *McAndrew v. Bassett* (33 *L. J.*, *Ch.* 561), the plaintiffs had manufactured liquorice

which they stamped with the word "Anatolia;" and it was held, that, though this was but the name of a place, yet a property in it could be acquired when it had been notoriously applied to a vendible commodity.

(5) And so where the omnibuses of an omnibus proprietor were marked with particular figures and devices, an injunction was granted to restrain an opposition omnibus proprietor from adopting similar figures and devices (*Knott v. Morgan*, 2 *Keen*, 219).

**Assignment of.** Sub-rule.—*Although a trader may have a property in a trade mark, sufficient to give him a right to exclude all others from using it; if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he will not be allowed to assign it; for that would be a fraud upon the public (Leather Cloth Co. v. American Leather Cloth Co., 1 H. & M. 271). But if the increased value of the goods is not dependent upon such personal merits, the trade mark is assignable (Bury v. Bedford, 33 L. J., Ch. 465).*

*Exception. Selling Articles under Vendor's own Name.*—Where a person sells an article with his own name attached, and another person of the same name sells a like article with his name attached, an injunction will not be granted to prevent such last-named person from doing so, unless it be proved that he does it with the fraudulent intention of palming his goods upon the public, as being those of the plaintiff (*Burgess v. Burgess*, 22 *L. J.*, *Ch.* 675; *Sykes v. Sykes*, 3 *B. & C.* 541).

**Registration.** RULE 74.—No person can institute any suit to prevent the infringement of any trade mark, until and unless such mark is registered in the register of trade marks (with regard to textile fabrics, this rule does not come into operation until January 1st, 1879). Registration is *primâ facie* evidence of the right to the trade mark, and after five years is conclusive evidence (38 & 39 Vict. c. 91, ss. 1, 3).



## SECTION 2.

### *Infringement of Patent Right.*

**Patent Right.** A patent right is a privilege granted by the Crown (by letters patent) to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen years, to make and vend such manufacture or invention.

The right is created and defined by various statutes, the first of which was 21 Jac. 1, c. 3, usually called the Statute of Monopolies. The rule laid down by that Act was as follows:—

RULE 75.—All letters patent for the term of fourteen years or under, by which the privilege of sole working or making any new manufactures within this realm, which others at the time of granting the letters patent shall

not use, shall be granted to the true and first inventor thereof; so as they be not contrary to law nor mischievous to the state, nor to the hurt of trade nor generally inconvenient.

It will be seen that the rule limits the grant of letters patent to the concurrence of four conditions: viz. (1) that the article must be a manufacture, (2) that it must be new, (3) that the patentee must be the true and first inventor, and (4) that it be of general public utility.

**What is a Manufacture.** A manufacture, according to the derivation of the word, means some article made by hand; but this is hardly the sense in which it is used in the rule.

Sub-rule 1.—“*The word manufacture has been generally understood to denote either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stone, a telescope, and many others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or some other useful purpose; or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but in a cheaper or more expeditious manner, or of a better and more useful kind*” (Abbott, C. J., *R. v. Wheeler*, 2 B. & Al. 349).

The latter part of this sub-rule has since been

taken out of the regions of conjecture, and expressly confirmed (*Crane v. Price*, 4 *M. & G.* 580).

Thus a patent for the omission merely of one or more of several parts of a process, whereby the process may be more cheaply and expeditiously performed, is valid (*Russell v. Cowley*, 1 *Webst. R.* 464).

**II. Newness of Manufacture.** As we have seen, the invention must be new, or otherwise the letters patent will afford it no protection. On this point the following principle, generally known as the rule in *Hill v. Evans*, is applicable.

Sub-rule 2.—*The prior knowledge of an invention to avoid a patent must be such knowledge as will enable the British public to perceive the very discovery and to carry the invention into practical use* (*Hill v. Evans*, 4 *D., F. & J.* 288.)

(1) Thus, a new combination of purely old elements is a novel invention, because the public could not have perceived the combination from the separate parts (*Hindm.* 124).

(2) On the other hand, the mere application of a known instrument to purposes so analogous to those to which it has been previously applied as to at once suggest the application, is no ground for a patent (*Harwood v. G. N. R. Co.*, 2 *B. & S.* 194, and 11 *H. L. C.* 654). So where there was a known invention for dressing cotton and linen yarns by machinery, and a subsequent patent was procured for finishing yarns of wool and hair, the process being the same as in the first invention for cotton and linen, the

patent was held void (*Brook v. Aston*, 32 *L. J.* 341, and *Patent Bottle Co. v. Seymer*, 5 *C. B.*, *N. S.* 164; but compare *Dangerfield v. Jones*, 13 *L. T.*, *N. S.* 142, and *Young v. Fernie*, 4 *Giff.* 577).

(3) Again, where crinolines were made of whalebone suspended by tapes, and an inventor claimed a patent for crinolines of exactly similar construction, with the single substitution of steel watch-springs for whalebone, it was held that there was not sufficient novelty.

(4) If the article be new in this realm, but not new elsewhere, it is yet the subject for a valid patent; for the object of letters patent is to give a species of premium for improving the manufactures, not so much of the world, as of the United Kingdom (*Beard v. Egerton*, 3 *C. B.* 97).

**Inference of Novelty.** Sub-rule 3.—*If there is great utility proved, novelty will be inferred, unless the facts render such inference impossible* (*Crane v. Price*, 1 *Webst. Pat. Ca.* 393; *Young v. Fernie*, 4 *Giff.* 577).

**III. Meaning of true and first Inventor.**  
Sub-rule 4.—*If the invention has been communicated to the patentee by a person in this country, he cannot claim to be the true and first inventor; but if he has acquired the knowledge of the invention abroad, and introduces it here, the law looks upon him as the true and first inventor* (*Lewis v. Marling*, 10 *B. & C.* 22; *Edgebury v. Stephens*, 2 *Salk.* 447).

The reason of this sub-rule is, that it is immaterial,



as far as regards the good of the kingdom, whether a man has acquired knowledge of the manufacture by study, observation, or travel (2 *Steph. Comm.* 27).

If the invention has been discovered before, but kept secret by the inventor, it does not render the patent of a subsequent inventor of it invalid; for it is new so far as the public are concerned (*Carpenter v. Smith*, 1 *Webst. R.* 534, per Lord Abinger).

**IV. General Public Utility.** Sub-rule 5.—*The community at large must receive some benefit from the invention* (Ad. 53).

The reason of this condition is obvious, for an useless invention not only does not merit the premium of a monopoly, but what is worse, prevents other inventors from improving upon it.

Thus if one produces old articles in a new manner, such new way must, in some way, be superior to the old method, in order to support a patent; for otherwise the old method is as good as the new. But if the article is produced at a cheaper rate by the new machine, or in a superior style, it is a good ground for a patent.

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**Specification.** As the object of letters patent is to give the benefit of an invention to the public at large, instead of allowing it to remain a secret in the hands of the inventor; it follows that the nature of the invention must be declared by the inventor.

**RULE 76.**—The letters patent are always

granted upon the condition, that they shall be void unless a sufficient description of the nature of the invention and the mode of carrying it into effect (so as to enable ordinarily skilful persons to practise and use it at the end of the term of fourteen years) shall be filed in the Court of Chancery, within a specified time (15 & 16 Vict. c. 83, s. 27).

Thus if the specification (as the description is called) be ambiguous, insufficient or misleading, it will render the patent void (*Simpson v. Holliday*, L. R., 1 H. L. 315; *Savory v. Price*, Ry. & Mo. 1); unless the ambiguity, variation, or imperfection be slight and immaterial, when it will not avoid the patent (*Gibbs v. Cole*, 3 P. Wms. 255).

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**Remedy for Infringement.** RULE 77.—The court may award damages, and also grant an injunction, and order an account for the infringement of a patent (15 & 16 Vict. c. 83, ss. 41 and 42; *Penn v. Jack*, L. R., 5 Eq. 81).

Of course the defendant in any such action or suit may plead the invalidity of the patent, on the grounds of want of novelty or utility, that the patentee is not the first and true inventor, that the article is

not the subject for a patent, &c.: or he may plead that his manufacture is different from that of the plaintiff; but in such a case he must show that the general idea and fashion of his invention is different to that of the plaintiff; for it may be, that the machinery for making the manufacture is not of the essence of, but only incidental to, the manufacture (*Boulton v. Watt*, 2 H. Bl., per Eyre, C. J.; *Jupe v. Pratt*, 1 Webst. R. 146).

Such is a slight sketch of the law relating to patents, which is, however, of so vast a character, that it almost forms of itself a separate branch of jurisprudence. Let us now pass on to the law of copyright.

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### SECTION 3.

#### *Of Infringement of Copyright.*

**Definition.** Copyright is the exclusive right which an author possesses of multiplying copies of his own work.

It seems to be doubtful whether copyright existed at common law, but, however that may be, it is *now* positively defined and settled by statute.

The first act on the subject was 8 Ann. c. 19, (afterwards amended by 15 Geo. 3, c. 53, and 41 Geo. 3, c. 107), by which the exclusive right of printing and reprinting was given to the author and his assigns for the term of fourteen years and no longer; provided that if the author should be living at the expiration of that period, the period should be extended to him for another term of fourteen years.

**Common Law Right.** It was long doubted whether, supposing the author to have a common law copyright, these statutes abridged it; but at length this was set at rest by the celebrated case of *Donaldson v. Beckett* (4 Burr. 2408), by which it was decided, that if any such right did exist at common law, it was nevertheless taken away by the statutes. And at the same time the majority of the judges expressed an opinion, that at common law the right of publishing and republishing his works belonged to the author and his assigns for ever.

The next act was 54 Geo. 3, c. 156, which extended the period to twenty-eight years; and if the author should be still living at the expiration of that period, to the residue of his natural life. .

**Law at present Time.** All these acts, however, are now repealed by 5 & 6 Vict. c. 45.

**RULE 78.**—(1) The copyright in a book published in the author's lifetime shall belong to the author and his assigns during the life of the author, and seven years after his death; provided that, if such period of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years (5 & 6 Vict. c. 45, s. 3).

(2) And also the copyright in a work published subsequently to the author's death,

shall belong to the proprietor of the manuscript for the term of forty-two years from the first publication (*Ibid.*).

(3) The proprietor of copyright commencing after the passing of that act (10th June, 1833) shall not sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall (sect. 11).

*Exception. Immoral Works.*—There is no copyright in libellous, fraudulent or immoral works (*Stockdale v. Onychyn*, 5 B. & C. 173; *Southey v. Sherwood*, 2 Mer. 435).

So where a work professes to be the work of a person other than the real author, with the object thereby to induce the public to pay a higher price for it, no copyright can be claimed in it (*Wright v. Tallis*, 1 C. B. 893).

**Meaning of Book.** Sub-rule.—*The word book includes every volume, part and division of a volume, pamphlet, sheet of letter-press, sheet of music, chart, map or plan separately published* (sect. 2).

(1) Thus there may be copyright in the wood engravings of a work, for they are part of the volume (*Bogue v. Houlston*, 5 De G. & Sm. 267).

(2) So also copyright may subsist in part of a work, although the rest may not be entitled to it (*Low v. Wood*, L. R., 6 Eq. 415).

(3) But it seems that copyright is not claimable in

a single word, as the title of a magazine; "Belgravia" for instance (*Maxwell v. Hogg*, *L. R.*, 2 *Ch.* 207).

### What is Piracy of Copyright. RULE 79.

—The act that secures copyright to authors, guards against the piracy of the words and sentiments, but it does not prohibit writing on the same subject (per Mansfield, C. J., *Sayre v. Moore*, 1 *East*, 359).

(1) Thus, in the above case, Lord Mansfield further directed the jury, that the question for them was, "whether the alteration be colorable or not; there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript, and nothing more than a transcript. In the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly here, any more than in other instances; but upon any question of this kind, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, so that it thereby becomes more serviceable and useful."

(2) And even where a great part of the plaintiff's work has been taken into the defendant's, it is no infringement, so that the defendant has so carefully

revised and corrected it, as to produce an original result (*Spiers v. Browne*, 6 *W. R.* 352); or, if it was fairly done with the view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter (per *Ellenborough, C. J., Cary v. Kearsley*, 4 *Esp.* 170).

**Honest Intention no Excuse.** Sub-rule.—*If, in effect, the great bulk of the plaintiff's publication—a large and vital part of his labour—has been appropriated, and published in a form that will materially injure his copyright; mere honest intention on the part of the appropriator will not suffice* (per *Wood, V.-C., Scott v. Stanford*, *L. R.*, 3 *Eq.* 723).

**What is Piracy of Music.** Thus, with respect to music, if the whole air be taken it is a piracy, although set to a different accompaniment, or even with variations; for the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same substantially; the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear (*D'Almaine v. Boosey*, 1 *Y. & C., Ex.* 288, per *Lyndhurst*). But, on the other hand, where one composed and published an opera in full score, and after his death B. arranged the whole opera for the piano, it was held that this was an independent



musical composition, and no piracy (*Wood v. Boosey*, *L. R.*, 3 *Q. B.*, *Ex. Ch.* 223).

**Plays founded on Novels.** To produce the incidents of a novel in the form of a play, is no infringement of copyright, unless the play be printed, or unless the novel was founded on a play, of the copyright of which the author was owner (see *Reade v. Conquest*, 30 *L. J.*, *C. P.* 209; *Tinsley v. Lacy*, 32 *L. J.*, *Ch.* 535; and *Reade v. Lacy*, 30 *L. J.*, *Ch.* 655).

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**Remedies.** **RULE 80.**—Any person causing a book to be printed for sale or exportation, without the written consent of the proprietor of the copyright; or who imports for sale such unlawfully printed book; or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any such book without the consent of the proprietor, shall be liable to a special action on the case at the suit of the proprietor, to be brought within twelve calendar months. And an injunction may be also obtained, to restrain the further infringement.

(1) Thus an injunction may be granted to restrain a person from printing the unpublished works of

another (*Prince Albert v. Strange*, 1 Mac. & Gor. 25). And an action at law may also be maintained for the same cause (*Mayall v. Higby*, 6 L. T., N. S. 362).

(2) An injunction will also be granted, if a person under colour of writing a review copies out so large and important a portion of the work as to interfere with the sale of it: but a reasonable amount of quotation, in order to review the work properly, is allowable (*Campbell v. Scott*, 11 Sim. 31; *Bell v. Walker*, 1 Bro. Ch. C. 450).

**Penalties.** Besides the remedy by action and injunction, there is also a quasi-criminal remedy in the case of *imported* piracies, by means of penalties. These do not take away the remedy by action or injunction, but are cumulative upon them (sect. 17).

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**Copyright in Oral Lectures, Dramas, and Works of Art.** Besides the copyright in literary works, there is also a copyright in various other productions.

Such are oral lectures, dramatic compositions, engravings, prints, lithographs, drawings, paintings, photographs, and sculptures and models. In a work like the present, space will not permit me to do anything more than sketch out the main heads of the rights of individuals in respect of these productions.

The publication of oral lectures, except those delivered in colleges, &c., is prohibited by 5 & 6 Will.

4, c. 65, without the author's consent; but in order to have the benefit of this act, the lecturer must give previous notice to two justices of the peace.

**Right of Representation of Dramatic and Musical Works.** The right of *representing* dramatic and musical compositions is vested in the author or composer, and his assigns, for the same period as in literary compositions, by 5 & 6 Vict. c. 45, s. 20, which also imposes penalties upon any person performing them without the written leave of the author or composer. These penalties are not cumulative, but only alternative.

**Assignment of Copyright does not include Right of Representation.** I may mention, that the assignment of the copyright of a book containing dramatic or musical compositions is only an assignment of the right of multiplying copies of it, and not of the right of representing it (sect. 22), unless at the time of registering the assignment the same is expressly stated. But a mere assignment of the right of representation does not seem to require registration (*Lacy v. Rhys*, 22 *L. J.*, *Q. B.* 157).

**Engravings.** Engravings are protected by the statutes 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

**Sculpture.** Sculptures and models by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

**Designs.** Useful and ornamental designs by "The Copyright of Designs Act, 1858," "The Designs Acts," 1842, 1843, and 1850, and "The Protection of Inventions Act, 1858."

**Works of Art.** Paintings, drawings and photographs by 25 & 26 Vict. c. 68.

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**Conclusion.** Here this summary statement of the law relating to torts must conclude. In compiling it, my design has been throughout to present to the reader an intelligible and orderly arrangement of the principles upon which the law depends.

It must not be imagined that I put forth this work as in any way a digest of the subject. Far from it. Were a digest alone wanted, nothing more could be desired than Mr. Addison's exhaustive treatise. I only claim for this the place of a guide book or manual, in which will, I think, be found all that is needful in the ordinary every-day practice of a solicitor's business.

Neither must the student imagine that such injuries as are not named in this or any other treatise are therefore not remediable by the law, for wrongs are infinitely various. Let him in such cases recollect the observation of Cicero, "*Erat enim ratio profecta a rerum naturâ, et ad recte faciendum impellens, et a delicto avocans: quæ non tum denique incipit lex esse cum scripta est, sed tum, cum orta est.*"

Lastly, although it has been my chief endeavour to render the work accurate and trustworthy, yet, to conclude in the words of Littleton, "I will not that thou believe that all I have said is law, for that will not I take upon me nor presume; but of those things that be not law, inquire and learne of my wise masters learned in the law. Notwithstanding that certain things that be noted and specified be not law, yet such things shall make thee more apt and able to understand, and learne the arguments and the reasons of the law: for by the arguments and reasons in the law, a man may more sooner come to the certaintie and to the knowledge of the law."

FINIS.

Periods of limitation in which actions - }  
Must be brought in the undermentioned cases }  
Actioner - must be brought within 4 years from

Assault battery in four years 116. 124 & 116.  
4. 124 & 116.  
except where it causes death & then  
it is not barred in 2 years after death.  
116. cap 107 & 7 & 8. Lord  
Granville's act.

Age of constables - 21 years 117.

Defamation - oral is slander - 2 years  
libel 6 years 98.

Dispossession - see 116. 124 & 116. - cap 108.  
4. within 6 years after the right accrued  
to the person through whom he claims.  
In case of disability - 5 years from the termination of disability  
or previous death.

Imprisonment - 4 years 116.

Nuisance - 6 years 116. 124 & 116.

Recovery of land - 6 years 116. 124 & 116.

Recovery of goods - 6 years 116. 124 & 116.

Recovery of money - 6 years 116. 124 & 116.

# INDEX.

---

- ABATEMENT,  
of nuisance, 198.  
not proper remedy to prevent prospective nuisance, 199.  
not proper remedy of commoner in respect of overstocked  
warren, *ib.*
- ACCIDENT,  
if inevitable, not actionable, 120.  
actionable, if preventible, *ib.*  
when occurrence of, *prima facie* evidence of negligence, 146.
- ACT OF GOD excuses what would be otherwise actionable, 12.
- ACTION, cannot be brought twice for same wrong, 63.
- ADMINISTRATOR, title of, to personal property, dates from  
death of intestate, 214.
- ADOPTION. *See* RATIFICATION.
- ADULTERY,  
damages for, 149.  
application of damages, 150.  
mitigation of damages for, *ib.*  
wife's previous adultery with other men, 151.  
secrecy of marriage, *ib.*  
evidence of wife's having enticed co-respondent, *ib.*  
connivance or indifference of petitioner, a bar to claim for  
damages, *ib.*
- ADVERTISEMENTS, criticism of, privileged, 98.
- ADVICE, confidential, a privileged communication, 97.
- AGGRAVATION. *See* DAMAGES.
- ANIMALS. *See* FEROCIOUS ANIMALS.  
injuries done to, 209.  
trespasses of, *ib.*  
injuries to, while trespassing, when tortious, 211.  
killing, in self-defence, justifiable, 212.



**ARREST.** *See* IMPRISONMENT.

malicious, liability for, 115.

what is malicious, *ib.* *unlawfully or contrary to law caused*caused by false statement or suppression, *ib.*caused by false affidavit, *ib.***ASSAULT AND BATTERY,**master responsible for, if committed by servant within the  
general scope of authority, 33 *et seq.*

damages for, 56, 124.

aggravation of damages for, 66.

mitigation of damages for, *ib.*

causing death, 118.

definition of assault, *ib.* *to make a violent or forcible attempt to do bodily harm*menacing, *ib.* *to make a violent or forcible attempt to do bodily harm*ability to do harm, necessary, *ib.*attempt necessary, *ib.*

committed in sport, not actionable, 119.

definition of battery, *ib.* *to make a violent or forcible attempt to do bodily harm*may be occasioned by anything set in motion by defendant, *ib.*

battery, voluntarily suffered, not actionable, 120.

mayhem, *ib.*intention to commit, immaterial, *ib.*caused by lawful act, actionable, *ib.*

caused by inevitable accident, excusable, 121.

general immunity from, *ib.*committed in self-defence, justifiable, *ib.*committed in mere retaliation, not justifiable, *ib.*committed in defence of property, justifiable, *ib.*

of pupil for sake of correction, justifiable, 122.

in order to stop breach of the peace, justifiable, *ib.*in order to arrest night offender, felon, malicious trespasser or  
vagrant, justifiable, *ib.*in order to expel disturber of congregation, justifiable, *ib.*by master of ship, *ib.*by officer of law, *ib.*unnecessary handcuffing of prisoner is, *ib.*proceedings before justices release civil proceedings, *ib.* *see also, note by*limitation of actions for, 124. *see also, note by***ATTORNEY**, slandering an, 92.**BAIL**, arrest of principal by his obligor, lawful, 106.**BAILEE**,may maintain trover and trespass, 213. *see also, note by*

destruction of goods by a conversion, 210.

sale of goods by assignees of, reverts possession in bailor, 213.

may set up *ius tertii*, when, 214. *see also, note by*

loss of goods by, no excuse, 218.

BAILMENT, remarks as to contract of, 27.

BAILOR,

may bring trespass against purchaser, where bailee has sold goods, 211.  
may maintain trover for conversion of goods by bailee, 210, 212.

BANKRUPT BAILEE, action against assignees of, by bailor for selling bailed goods, 213.

BATTERY. *See* ASSAULT AND BATTERY.

BODILY INJURIES. *See* ASSAULT.

caused by nuisances. *See* NUISANCE.

caused by negligence. *See* NEGLIGENCE.

BOOKS, copyright in. *See* COPYRIGHT.

BRICK-BURNING, near highway a public nuisance, 126.

CAMPBELL'S (LORD) ACT, 143 *et seq.*

gives right of action to relatives of person killed through another's default, *ib.*

who may sue in case executor does not, 144.

when action maintainable, 145.

for whose benefit maintainable, *ib.*

jury must apportion damages, *ib.*

plaintiffs must have suffered some pecuniary loss, *ib.*

not maintainable when deceased received compensation before death, 146.

death must be caused by the act for which compensation claimed, *ib.*

action must be brought within twelve months, *ib.*

CANDIDATE for office, character of, privileged communication, 97.

CARRIER liable for misfeasance to a person with whom he has not contracted, 26.

CATTLE. *See* TRESPASS.

when injury is done to, by dog, scienter need not be shown, 143.

word includes horses, *ib.*

CHARACTER,

fraudulent, when actionable, 13.

of servant when a privileged communication, 97.

of candidate for office, given to a voter or elector, a privileged communication, *ib.*

CHARACTER—*continued.*

- evidence of plaintiff's bad character in mitigation of damages in defamation, 65.
- of daughter's loose character in mitigation of damages in seduction, 64, 157.
- of wife's bad character in mitigation of damages in adultery, 151.

CHASTISEMENT, plea of reasonable, 122.

CHATTELS, trespass to, and conversion of. *See* TRESPASS; and *see* WRONGFUL CONVERSION.

CHILDREN of deceased parent, action by. *See* CAMPBELL'S (LORD) ACT.

CLERGYMAN, imputing unchastity to a beneficed, is actionable per se, 92.

## COMMITMENT,

- for contempt of court, 112.
- by judges of inferior courts, *ib.*

## COMMON,

- disturbances of, threefold, 196.
- putting beasts on to by person not a commoner, or putting of uncommonable beasts on to by a commoner, *ib.*
- prescriptive right to put uncommonable beasts on to, *ib.*
- without prescription uncommonable beasts may be distrained damage feasant, *ib.*
- surcharging, what is, 197.
- remedy of lord and commoners for, *ib.*
- obstructing, *ib.*
- remedy for, 198.

COMMON EMPLOYMENT, meaning of. *See* MASTER AND SERVANT.

CONCEALMENT, when fraudulent, 13.

CONSEQUENTIAL DAMAGES. *See* DAMAGES.

## CONSTABLE,

- cannot, in general, arrest without a warrant, 106.
- must have warrant with him, 108.
- may arrest without warrant,
  - on reasonable suspicion of felony, 106.
  - for breach of peace, even after affray over, in order to take offender before a justice, 107.
  - for night offences, 108.
  - for malicious injuries, *ib.*
  - for offering goods for pawn suspiciously, *ib.*
  - for acts of vagrancy, *ib.*

CONSTABLE—*continued*.

- local acts empowering constables, 109.
- protected if acting ministerially for a court having jurisdiction (or *prima facie* jurisdiction in certain cases), 111, 112.
- special protection of, in executing warrants of justices without jurisdiction, 114.
- limitation of actions against, 117.
- notice of action to, *ib.*
- power of, appointed by municipal corporations, *ib.*
- payment of money into court by, *ib.*
- venue in actions against, local, *ib.*

CONTINUAL CLAIM no bar to statute in ejectment, 171.

CONTINUING TORTS,

- commencement of period of limitation in, 54.
- fresh action may be brought for, until they are stopped, *ib.*

CONTRACT,

- torts arising out of, 24.
- privity necessary in order to recover for torts arising out of, 25.
- damages in torts arising out of, 69.

CONTRACTOR, employer not in general liable for nuisance committed by, or negligence of, 38.

CONTRIBUTORY NEGLIGENCE. *See* NEGLIGENCE.

CONVERSION. *See* WRONGFUL CONVERSION.

COPYRIGHT,

- definition of, 234.
- former law of, *ib.*
- at common law, 235.
- law of, at present time, *ib.*
- none in immoral or fraudulent works, 236.
- meaning of book, *ib.*
- in part of a book and not in residue, *ib.*
- none in a mere word, *ib.*
- what is piracy of, 237.
- carefully revising and correcting old matter no infringement, *ib.*
- new arrangement of old work no infringement, *ib.*
- honesty of intention immaterial, 238.
- what is piracy of, in music, *ib.*
- plays founded on novels, 239.
- remedies for infringement of, *ib.*
- injunction to prevent publication of unpublished manuscript, *ib.*
- piracy by review, 240.
- in oral lectures, *ib.*

COPYRIGHT—*continued*.

- right of representing dramatic and musical compositions not included in assignment of copyright of, 241.
- in engravings, *ib*.
- in sculpture, *ib*.
- in designs, 242.
- in works of art, *ib*.

## COUNSEL,

- opinion of, no excuse for malicious prosecution, 102.
- statements of, how far privileged communications, 96.

CRIME. *See* DEFAMATION.CRITICISM. *See* DEFAMATION.

## DAMAGE,

- without wrongful act, not actionable, 5.
- when necessary, *ib*.

## DAMAGE FEASANT,

- cattle may be distrained when trespassing, 160.
- unless tended at time, *ib*.

## DAMAGES, measure of, in actions of tort, 55.

- (1) *For injuries to person and reputation*.
  - for false imprisonment, *ib*.
  - for adultery, 149.
  - for seduction, 56, 157.
  - for assault and battery, 124.
  - for defamation, *ib*.

mistake or ill-feeling of jury, 57.

aggravation and mitigation of, 64.

- for adultery, 151.
- for seduction, 64.
- for defamation, 65.
- for false imprisonment, 66.
- for battery, *ib*.

consequential damages, 59.

- loss of business, *ib*.
- medical expenses, *ib*.
- loss of property through agitation, *ib*.
- under Lord Campbell's Act, 60.
- injury to trade, *ib*.

prospective damages may be given, 63.

continuing torts, 64.

- (2) *For injuries to property*, 57.
  - compensatory in character, *ib*.
  - injury to horse, *ib*.
  - for wrongful conversion, 58.
  - infringement of patent, *ib*.

**DAMAGES**—*continued.*

- aggravation and mitigation, 64.
  - insolence, 67.
  - wrongful seizure, *ib.*
  - causing suspicion of insolvency, *ib.*
  - return of goods, *ib.*
- where plaintiff only bailee, 68.
- consequential damages, 59.
  - hiring substitute in place of a chattel, 61.
  - trespass, *ib.*
  - infectious disease, *ib.*
  - flooding lands, 62.
  - having been obliged to pay damages to third party, *ib.*
- presumption of amount of damage against a wrongdoer, 68.
- in torts founded on contract 69.

**DAMNUM**, definition of, 6, n. *See Damnum*

**DANGER**, trespass under the influence of a pressing, 7, 14.

**DANGEROUS** substances brought on to land must be kept at peril of bringer, 13.

**DAUGHTER**, action for seduction of. *See SEDUCTION.*

**DECEASED** person. *See CAMPBELL'S (LORD) ACT.*

**DECEIT.** *See FRAUD.*

**DEFAMATION**, 83.

- oral or written, *ib.*
- what constitutes, *ib.*
- falsity, 84.
- disparagement, what is, *ib.*
- untrue accusation of fraud incident to an actually committed illegal act actionable, 85.
- construction of words in natural sense, *ib.*
- ironical words, *ib.*
- publication, 86.
- intention to publish immaterial where negligence, *ib.*
- functions of court and jury as to publication, *ib.*
- malice, *ib.*
- actual damage when necessary, 87.
  - when too remote, 88.
  - imputation of unchastity, 89.
  - imputation of crime actual damage of itself, 90.
  - imputation of mere breach of trust aliter, 91.
  - imputation of unfitness for society, *ib.*
  - imputation of misconduct in business, 66.
- repetition of defamation, 92.
  - printing of, 93.
  - newspaper proprietors protected, 94.

DEFAMATION—*continued*.

- privileged communications, 94.
- functions of court and jury, 95.
- parliamentary proceedings, 96.
- judicial proceedings, *ib*.
- confidential advice, 97.
- criticism, *ib*.
- criticism of public men, 98.
- limitation of actions for, 98.
- damages. *See* DAMAGES.

DEFECT. *See* FRAUD.DEFENCE. *See* ASSAULT.

## DESIGNS, copyright in, 242.

## DETINUE,

- action of, 218.
- judge may order return of specific goods in, *ib*.

## DISABILITY,

- suspends commencement of period of limitation, 53.
- when taking place subsequent to commencement of period of limitation, is no bar, 54.

## DISPOSSESSION,

- definition of, 166.
- plaintiff must rely on strength of his own title, 167.
- mere possession evidence of title for defendant, *ib*.
- plaintiff's title need not be indefeasible, *ib*.
- jus tertii* available by defendant, but not by plaintiff, *ib*.
- landlord claimant need not prove his title, 168.
- tenant may show expiration of landlord's title, *ib*.
- master and servant, *ib*.
- licensor and licensee, *ib*.
- claimant's title must be legal, not equitable, *ib*.
- limitation, 169.
  - disability, *ib*.
  - acknowledgment of title, 170.
  - ecclesiastical corporations, *ib*.
  - commencement of period of, *ib*.
  - discontinuance of possession, 171.
  - occupation of servant no discontinuance, *ib*.
  - mere entry and continual assertion of claim no bar to running of statute, *ib*.

## DOGS,

- noisy, 177.
- liability of owner for injuries by. *See* FEROCIOUS ANIMALS.
- injury to, 209.
- killing in self-defence, 212.
- killing in defence of sheep or cattle, *ib*.
- killing in defence of game, when justifiable, *ib*.



## DOOR,

- careless shutting, of railway carriages, 138.
- contributory negligence by leaving hand on, *ib.*

DRAMATIC COMPOSITIONS. *See* COPYRIGHT.

## EASEMENT,

- what is an, 173; *and see* NUISANCE.
- grantee of, may enter upon servient tenement in order to repair, 161.

EJECTMENT. *See* DISPOSSESSION.

## ENGINES, near highway, a public nuisance, 126.

## ENGRAVINGS, copyright in, 241.

## ENQUIRIES, by the finder of a chattel, before delivering to true owner, is no conversion, 217.

## EX DAMNO SINE INJURIA, &amp;c., 5.

FALSE IMPRISONMENT. *See* IMPRISONMENT, CONSTABLES, JUSTICES.FALSE REPRESENTATION. *See* FRAUD.FELLOW SERVANTS. *See* MASTER AND SERVANT.

## FELONY, remedy by action for, suspended until criminal trial ended, 22.

- how suspension may be effected, *ib.*

## FENCES, non-liability for trespass of cattle if adjoining owner bound to keep in repair, 159.

## FERÆ NATURÆ, trespasses of animals, 161.

## FEROCIOUS ANIMALS,

- liability for injuries caused by, 141.
- scienter the gist of the action for, *ib.*
- presumption of scienter, *ib.*
- when scienter not presumed, *ib.*
- proof of scienter, 142.

## FIRE, negligent keeping of, 135.

## FIREWORKS near highway, a public nuisance, 126.

## FRAUD,

- when actionable, 201.
- false representation of value of business to a purchaser, *ib.*
- false representation of soundness of a dangerous instrument, 202.

FRAUD—*continued*.

- meaning of fraudulent, 202.
- must be moral turpitude, *ib.*
- recklessness sufficient, *ib.*
- liability for fraud of agent, 203.
- fraudulent character must be in writing to be actionable, 205.

## FRAUDULENT CONCEALMENT,

- when actionable, 205.
- concealing infectious disease in pigs, 206.
- concealing defect in ship, *ib.*
- mere abstinence from mentioning a known defect is not actionable, 207.
- an industrious concealment aliter, *ib.*
- plastering over a defective wall, *ib.*
- expression, "with all faults," 208.

FUNERAL EXPENSES not recoverable under Lord Campbell's Act, 146.

## GAME,

- property in, not absolute, 210.
- killing dog in order to preserve, when justifiable, 212.

GOODS. *See* TRESPASS and WRONGFUL CONVERSION and NEGLIGENCE.

GUN, explosion of a warranted, 26.

## HIGHWAY,

- obstruction of, 8.
- dedication of, to public not a grant of the land, 164.
- trespass may be maintained by grantor of, *ib.*

## HORSE,

- accident caused by a runaway, excusable, 11.
- injuries to, by dog, 143.
- is included in the word cattle, *ib.*
- measure of damages for injury to, 57.

HOUSE, liability for ruinous state of. *See* NUISANCE.

ICE, when a public nuisance, 17, 18.

## IMMORALITY,

- verbal imputation of, against a beneficed clergyman, a slander per se, 67.
- verbal charge of, in general not actionable without proof of special damage, 89.

## IMPRISONMENT,

- what constitutes, 105.
- moral restraint constitutes, *ib.*
- total restraint necessary, *ib.*
- by judges and magistrates. *See* JUDGE.
- by private persons and constables, 106.
  - general immunity from, *ib.*
  - arrest of bail by his surety, *ib.*
  - arrest of suspected felon when justifiable, *ib.*
  - what suspicion sufficient, *ib.*
  - arrest of breakers of the peace, 107.
  - arrest of night offenders, 108.
  - arrest of malicious injurers, *ib.*
  - arrest of suspected persons offering goods for pawn, *ib.*
  - arrest of vagrants, *ib.*
  - acts of vagrancy, *ib.*
- in other cases warrant necessary, *ib.*
  - certain offenders can ~~only~~ be arrested flagrante delicto, 109.
  - particular powers of arrest given to individuals, *ib.*
  - general protection of persons setting courts of justice in motion, 111.
  - no protection if court has no jurisdiction, *ib.*
- for contempt of court, 112.
  - by county court judge, 113.
  - by justice, *ib.*
- habeas corpus, 115.
- ( limitation of action for, 116.
  - is a continuing tort, *ib.*
  - in case of justices and constables, 117.
- notice of action to justices and constables, 116 *et seq.*
- damages for, 55.
  - aggravation of damages, 66.

INCORPOREAL HEREDITAMENT, injury to. *See* SUPPORT,  
LIGHT, WATERCOURSE, WAY, and COMMON.

INEVITABLE ACCIDENT. *See* ACCIDENT.

INFERIOR COURT, power of, to commit for contempt, 113.

## INJUNCTION,

- remedy by, 71.
- interlocutory or perpetual, *ib.*
- injuries remediable by, *ib.*
- noxious fumes, 72.
- noise, *ib.*
- obstruction of light and air, *ib.*
- cases where damages given instead, 73.
- not granted for a mere trespass, 75.
- where waste also aliter, *ib.*
- pollution of lake, *ib.*

INJUNCTION—*continued.*

deprivation of support, 75.  
 trade mark, patent, and copyright, *ib.*  
 not granted to restrain libel, *ib.*  
 publication of private letters, 76.  
 where injury merely threatened, *ib.*  
 granted even where it will inconvenience public, 77.  
 mandatory, *ib.*  
 delay, 79.

## INJURIA,

is always necessary to a tort, 5.  
 when no tort without special damage, *ib. et seq.*

## INJURIÆ, classification of, 9.

## INSANITY, imputation of, defamatory, 85.

INTENTION, not material in torts, 15 *et seq.*INVENTOR. *See* PATENT.

## INVOLUNTARY TORTS, when actionable, 10.

## JOINT OWNERS, trespasses of, towards each other, 165, 216.

## JUDGE,

statements of, absolutely privileged communications, 96.  
 not liable for a wrongful imprisonment committed erroneously  
 if acting within his jurisdiction, 109.  
 who is a, 111.  
 jurisdiction of, how constituted, *ib.*  
*prima facie* jurisdiction is sufficient if through ignorance of  
 some fact of which he could have no knowledge he has no  
 jurisdiction, 112.  
 power of, to commit for contempt, *ib.*  
 of county court, power of, 113.

## JUDICIAL PROCEEDINGS, how far privileged communications, 96.

JURISDICTION. *See* JUDGE.

## JUS TERTII,

defendant in ejectment may set up, but not claimant, 167.  
 may be set up in trover where defendant not bailee or agent,  
 214.

JUSTICE OF THE PEACE. *See* IMPRISONMENT.JUSTIFICATION. *See* DEFAMATION, ASSAULT, TRESPASS, IMPRISONMENT.

*The distinction as to the jurisdiction between  
 a judge and a justice of the peace is*

**LANDLORD,**

- title of, cannot be disputed by tenant, 168.
- may maintain action for injury to the reversion, 200.
- when liable for nuisance on demised premises, 129 *et seq.*
- written acknowledgment of title of, a bar to the Statute of Limitations, 170.
- occupation of servant of, equivalent to personal occupation, 168.

**LECTURES**, copyright in, 241.**LIBEL**, no injunction to restrain a, 75. *See* DEFAMATION.**LIBERUM TENEMENTUM**, plea of, in trespass to land, 167.**LICENSEE,**

- a mere, stands in the position of one of the family as regards injuries caused by nuisances, 132. (*See* *ib.*)
- possession of, is the possession of the licensor, 168.

**LIEN,**

- sale of goods held under, a wrongful conversion, 213.
- damages for sale of goods held under, *ib.*

**LIGHT AND AIR,**

- no right to, *ex jure nature*, 186.
- no proof of special damage necessary, *ib. et seq.*
- no excuse that plaintiff has contributed to the diminution, 188.
- enlargement of ancient lights, *ib.*
- dominant tenement must be a building, *ib.*
- a man cannot obstruct on property granted by him to another, *ib.*
- rights of two vendees from same vendor, 189.
- right to, lost by giving licence to another to do an act, the natural consequence of which is an obstruction of, *ib.*

**LIME KILN**, when a public nuisance, 126.**LIMITATION,**

- of actions of tort, 51.
- reasons for, *ib.*
- commencement of period of, 52.
- when tort consists of actual damage, commencement of period of, *ib.*
- conversion, 53.
- disability, *ib.*
- disability arising subsequently to commencement of period, 54.
- commencement of period when tort continuing, *ib.*
- in particular cases see under the several headings of those cases.

**LOSS OF SERVICE.** *See* SEDUCTION.

MAGISTRATE. *See* JUSTICE.

MALICE. *See* DEFAMATION.

MALICIOUS ARREST. *See* IMPRISONMENT.

MALICIOUS PROSECUTION,

meaning of, 99.

what constitutes, *ib.*

malice generally implied, *ib.*

knowledge of plaintiff's innocence evidence of malice, 100.

knowledge of defendant that he was in the wrong, evidence of malice, *ib.*

to stop plaintiff's mouth, *ib.*

counsel's opinion no excuse for, 102.

not actionable if reasonable cause for suspicion existed, 101.

want of probable cause, never implied in actions for, *ib.*

subsequent malice of the defendant, 100.

adoption of proceedings already commenced, *ib.*

where defendant bound over by a magistrate to prosecute, no excuse for, *ib.*

act of magistrate in general an excuse, 103.

aliter where specific charge made, *ib.*

causing search warrant to issue, *ib.*

setting aside of proceedings, a condition precedent to action for, 102.

MAN-TRAPS, when illegal, 126.

MANUFACTURE. *See* PATENT.

noxious or offensive, an actionable nuisance, 175.

MANUSCRIPT, copyright in unpublished, 239.

MAP, copyright in, 236.

MASTER AND SERVANT,

as to enticing and seducing servants. *See* SEDUCTION.

master in general has no remedy against one who injures servant *ex contractu*, 25.

general liability of master for torts of, 29.

accidents occasioned by carelessness of servant, *ib.*

master not liable for illegal act of servant, 31.

master liable for wilful act of servant if within the general scope of his authority, *ib.*

liability of master for assaults of servant committed in scope of his employment, 33, 34, 35.

master not liable for servant's torts when committed outside or beyond scope of his employment, 30, 33.

master not liable for injuries caused by servant while driving master's carriage on business of his own, *ib.*

MASTER AND SERVANT—*continued.*

- ratification of servant's tort, 36.
- meaning of term servant, *ib.*
- master not liable for torts committed by persons employed by servant, *ib.*
- contractor or intermediate employer liable for torts of workmen, 37, 38.
- job-master liable, and not hirer of horses, *ib.*
- cases where employer and contractor liable, 38 *et seq.*
- temporary employment by a third party excuses master, 40.
- unauthorized delegation by a servant of his duties excuses master from delegates' torts, *ib.*
- when master liable for injuries caused by servant to fellow-servant, 42.
- meaning of common employment, 43 *et seq.*
- personal negligence of master, 46.
- servant's knowledge of danger, when a bar, 48, 49.
- volunteers, 49.

## MAXIMS OF LAW, 3.

MEASURE OF DAMAGES. *See* DAMAGES.MEDICAL EXPENSES. *See* CAMPBELL'S (LORD) ACT.MEDICAL MEN,  

- negligence of, 24, 26.
- slandering, 92.

## MEDICINES, duty of ships to have on board, 19.

## MINE,

- causing subsidence of surface by excavating, 175—181.
- flooding of, by water brought by defendant on to his land
- actionable without proof of negligence, 13.

## MISFEASANCE, liability for, 27.

MISREPRESENTATION. *See* FRAUD.

## MISTAKE, no justification, 14.

MITIGATION. *See* DAMAGES.MURDER. *See* DEFAMATION.MUSICAL COMPOSITIONS, assignment of copyright in, is no  
 assignment of the right of public representation of them,  
 241.

## NECESSITY, right of way of, 194.



## NEGLIGENCE,

- when actionable, 135.
- what constitutes, *ib.*
- onus of proof of, 145.
- contributory, 137.
- where contributory, affords no excuse, 139.
- contributory, in infants, 140.
- keeping ferocious animals. *See FEROCIOUS ANIMALS.*
- actions by representatives of a person killed by. *See CAMPBELL'S (LORD) ACT.*
- duties of judge and jury in actions for, 147.

NEWSPAPERS. *See DEFAMATION.*NOISE. *See NUISANCE.*NOTICE of action to justices and constables, 116 *et seq.*NOXIOUS TRADE. *See NUISANCE.*

## NUISANCE,

- (1) *Causing Injury to the Person*, 125.
  - definition, *ib.*
  - excavations near roads, *ib.*
  - noxious fumes, *ib.*
  - foul cesspools, 126.
  - spring-guns and man-traps, *ib.*
  - even trespassers injured by spring-guns and man-traps may maintain action, *ib.*
  - spring-guns for protection of dwelling-houses at night, lawful, *ib.*
  - pit or engine near highway, illegal, *ib.*
  - windmills and fires for burning ironstone near highway nuisances, 126.
  - letting off fireworks near highways, *ib.*
  - injuries caused by quarries at a distance from highway not actionable, 127.
  - ruinous premises, *ib.*
  - where nuisance subsists negligence is immaterial, *ib.*
  - landlord not liable for injuries caused to tenant by ruinous premises, 129.
  - aliter in case of fraud, *ib.*
  - tenant only generally liable to third parties, *ib.*
  - landowner liable if he authorized the nuisance, *ib.*
  - nuisances on or near private ways, 131.
  - ruinous railway works, 132.
  - act of God justification, *ib.*
  - dangerous canals, *ib.*
  - injuries to guests through a subsisting, *ib. et seq.*
  - injuries to persons coming on business, *ib.*
  - injuries through improper condition of railway stations, 133.
  - ill-lighted stations, *ib.*
  - limitation, 134.

**NUISANCE**—*continued.*

(2) *Causing Injury to Real Property.*

- definition of a, 174.
- general principle applicable to, *ib.*
- affecting corporeal hereditaments, 175.
- disgusting fumes, *ib.*
- noisy trade, *ib.*
- the nuisance must be material, 176.
- noisy entertainments, *ib.*
- other examples, 177.
- overhanging eaves, *ib.*
- overhanging trees, *ib.*
- pig-stys, *ib.*
- noisy dogs, *ib.*
- reasonableness of place when no excuse, *ib.*
- distinction between injury to property and annoyance in its user, *ib.*
- immaterial whether plaintiff goes to the nuisance or it to him, *ib.*
- prescriptive right to commit, 180.
- easements, 173.
- profits à prendre, *ib.*
- customs, *ib.*
- title to easements, 174.
- disturbance of right to support, 180.
- right may be released by agreement, 181.
- the damage must be material, *ib.*
- railway and canal companies have no right of support, 184.
- subterranean water, *ib.*
- land burdened with buildings, *ib.*
- support from adjoining houses, 185.
- quære whether right can be gained by prescription, 186.
- right to light and air. *See* LIGHT AND AIR.
- right to watercourse. *See* WATERCOURSE.
- right to ways. *See* WAY.
- remedy by abatement, 198.
- remedy by abatement not applicable to prospective nuisances, 199.

**OBSTRUCTION** of entry to places of business, 7, 8.

of road, 8.

of light and air. *See* LIGHT AND AIR.

**OMNIBUS**, fraudulent imitation of, by a rival proprietor, 227.

**OUSTER.** *See* DISPOSSESSION.

**PARTY WALL**, trespass to, 165.

## PATENT, how obtained, 228.

conditions to valid grant of, 229.

what is a manufacture entitled to, *ib.*

newness of manufacture necessary to, 230.

rule in *Hill v. Evans*, *ib.*prior knowledge of the public fatal to, *ib.*new combination of old elements, *ib.*application of a known instrument to analogous purposes, *ib.*

newness only applies to the United Kingdom, 231.

novelty inferred where utility very great, *ib.*meaning of true and first inventor, *ib.*

secret prior knowledge of another no bar to, 170.

manufacture must be of general public utility, 232.

producing old articles in a new way when a new manufacture, *ib.*specification, *ib.*

remedy for infringement, 233.

PATENT DEFECT. *See* FRAUD.

## PERJURY, no action lies for consequences of, 96.

imputation of, not actionable, unless made with reference to a judicial inquiry, 91.

PERSONAL PROPERTY, trespass to. *See* TRESPASS.PIGSTY. *See* NUISANCE.

## POSSESSION, necessary to maintain trespass, 163.

dates back to accrual of title, 164.

prima facie evidence of title, *ib.*

in general good against all but true owner, 167.

meaning of discontinuance of, 170.

disturbance of, with respect to goods, 209.

necessary to maintain trespass for goods, 213.

follows title in personal property, *ib.*

what, suffices as against a wrongdoer, 214.

injuries to goods whilst in another's, 215.

PRESCRIPTION. *See* LIGHT AND AIR, NUISANCE, SUPPORT, WATERCOURSE, WAY, COMMON.

## PRINTER liable for libel, 93.

## PRINTING of an oral slander by unauthorized third party, 91.

PRIVATE WAY. *See* WAY.PRIVILEGED COMMUNICATIONS. *See* DEFAMATION.

## PRIVITY in quasi torts, 25.

## PROBABLE CAUSE, want of, in malicious prosecution, the gist of the action, 101.

PROBABLE CONSEQUENCE, every man presumed to intend the, of his acts, 16.

PROFESSIONAL MEN, negligence of, 24.

PUBLICATION. *See* DEFAMATION.

PUBLIC NUISANCE. *See* NUISANCE.

QUARRY, injuries caused by falling into, when actionable and when not, 126.

RAILWAY COMPANY. *See* NEGLIGENCE, MASTER AND SERVANT, and NUISANCE.

RATIFICATION. *See* MASTER AND SERVANT.

RECAPTION, 217.

RECKLESS CONDUCT, liability for consequences of, 16.

RE MOTENESS of damage, 11, 16.

REPLEVIN, action of, 219.

RESULT of wrongful act, if naturally in sequence, may be sued on, 18.

REVERSIONER,

may enter into and inspect premises, 161.

remedy of, for injury to land, 200.

remedy of, for trespass, accompanied by a denial of title, *ib.*

remedy of, for obstructions, *ib.*

no remedy given to, for mere transient trespasses or nuisances, *ib.*

some injury to the reversion must be proved, *ib.*

RIVER. *See* WATERCOURSE.

RUINOUS PREMISES. *See* NUISANCE.

SALE,

wrongful, is a conversion, 212, 213.

of goods held under a lien is a conversion, 213.

of goods in market overt passes property, 221.

unless seller prosecuted to conviction, *ib.*

SCIENTER. *See* FEROCIOUS ANIMALS.

SCULPTURE, copyright in. *See* COPYRIGHT.

## SEDUCTION,

- action for, whence arising, 152.
- of servant from master's employ is actionable, *ib.*
- contract of service when implied, 153.
- any profit gained by, may be recovered, *ib.*
- debauching plaintiff's daughter, *ib. et seq.*
- proof of loss of service necessary to sustain an action for, *ib.*
- contract to pay wages unnecessary to create relation of master and servant, 154.
- small services suffice, *ib.*
- when daughter lives with her father and is a minor, service is presumed, *ib.*
- aliter where the daughter acts as another's housekeeper, *ib.*
- aliter where she supports her father, *ib.*
- where service to another is put an end to, the right of the parent revives, *ib.*
- temporary visit no termination of service, 155.
- relation of master and servant must subsist at time of seduction, *ib.*
- death of daughter, *ib.*
- if parent helps to bring about his own dishonour he cannot recover, 156.
- who may be plaintiff, *ib.*
- damages in, 157.
  - aggravation of, *ib.*
  - breach of promise of marriage not matter of aggravation, *ib.*
  - mitigation of, *ib.*
  - previous immorality or looseness, *ib.*
- limitation, 158.

SERVANT. *See* MASTER AND SERVANT.

- may sue for loss of luggage although master paid the fare, 26.

## SHEEP, injuries to, by dog actionable without proof of scienter, 143.

SLANDER. *See* DEFAMATION.SPRING-GUNS. *See* NUISANCE.

## STATUTORY DUTIES,

- breaches of, 19.
- remedy by action for, not taken away by reason of a penalty being attached, *ib.*
- aliter if penalty only recoverable by party aggrieved, 20.
- where no right created in favour of the plaintiff there is no action maintainable, 21.
- copyright, *ib.*

SUPPORT. *See* NUISANCE (2).

TENANT. *See* LANDLORD.

- cannot dispute landlord's title, 168.
- but may show that title has expired, *ib.*

TITLE. *See* TRESPASS and DISPOSSESSION.

## TORT,

- definition of, 4.
- arising out of contract, 24.

## TRADE MARK,

- definition of, 222.
- nature of the title to relief, 223.
- injunction to restrain infringement of, 225.
- damages, *ib.*
- account of profits, *ib.*
- assignment of, 227.
- selling articles under seller's own name, *ib.*
- registration necessary before bringing an action, 228.

## TRESPASS, ratification of a, 36.

- (1.) *To Lands (quare clausum fregit)*, 159.

- definition, *ib.*
- what it consists of, *ib.*
- driving nails into wall is, *ib.*
- by straying cattle, *ib.*
- any user going beyond that authorized, 160.
- remedy for, by distress damage feasant, *ib.*
- committed by escape of dangerous substances, 12 *et seq.*, 160.
- by escape of water brought by defendant on to his land, *ib.*
- of animals *feræ nature*, 161.
- in retaking goods, justifiable, *ib.*
- in driving cattle off plaintiff's land, when justifiable, *ib.*
- in distraining for rent, justifiable, *ib.*
- in executing legal process, justifiable, *ib.*
- by reversioner inspecting premises, justifiable, *ib.*
- in escaping a pressing danger, justifiable, *ib. et seq.*
- by grantee of easement for the purpose of making repairs, justifiable, 161.
- under due legal authority, justifiable, 162.
- plea of *liberum tenementum*, *ib.*
- trespassers *ab initio*, *ib.*
- intention immaterial, 14.
- possession necessary to maintenance of action for, 163.
- when two people are in adverse possession, possession is in person entitled, *ib.*
- possession dates back to title, 164.
- onus of proof of title lies on *primâ facie* trespasser, *ib.*
- when surface and subsoil in different owners, *ib.*
- to highways, *ib.*

TRESPASS—*continued.*

- (1) *Trespass to Lands (quare clausum fregit)*—*continued.*
  - of joint owners, 165.
  - carrying away of soil by one of two joint owners, *ib.*
  - reasonable working of coal mine by joint owner, *ib.*
  - injuries to party-walls, *ib.*
  - continuing, 166.
  - damages for, 58.
  - aggravation of damages, 64.
  - limitation of actions for, 166.
- (2.) *To Goods and Chattels (de asportatis bonis).*
  - what is, 209.
  - to animals, *ib.*
  - good intention no excuse, 210.
  - by wrongful distress, *ib.*
  - destruction of goods by bailee, *ib.*
  - excessive sale by sheriff, *ib.*
  - killing game or animals *feræ naturæ*, *ib.*
  - purchasing goods without title, 211.
  - no trespass if plaintiff in fault, *ib.*
  - no remedy if animals get injured whilst trespassing, unless defendant used unreasonable force, *ib.*
  - wrongful alteration or mixing up of goods prevents the person altering from maintaining an action for the materials or goods with which the alteration was made or mixed, *ib.*
  - unauthorized painting of carriage, *ib.*
  - trespass in defence of property, 212.
  - shooting a trespassing dog, when allowable, *ib.*
  - trespass in self-defence, *ib.*
  - trespass in exercise of right, *ib.*
  - trespass in exercise of legal authority, *ib.*
  - possession necessary to maintenance of action, 213.
    - reversioner cannot sue for, *ib.*
  - possession follows title, *ib.*
  - bailee delivering goods to an unauthorized person reverts possession in bailor, *ib.*
  - sale of bailor's goods by assignees of bailee reverts possession in bailor, *ib.*
  - sale by a person having a lien is a trespass, *ib.*
  - damages for sale of goods by person having a lien, 214.
  - administrator may maintain trespass for injuries to goods committed before grant of administrator, *ib.*
  - so may a trustee when possession actually in cestui que trust, *ib.*
  - what possession suffices, *ib.*
  - possession of finder, *ib.*
  - possession, *primâ facie* proof of title, *ib.*
  - defendant cannot in general set up *jus tertii*, *ib.*
  - remedy of reversioner for permanent injury, 215.
  - trespass *ab initio*, 216.



TRESPASS—*continued*.

- (2) *To Goods and Chattels (de asportatis bonis)*—*continued*.  
 reception, 216.  
 action for trespass, 218.  
 limitation, *ib*.

TRESPASSER, injury to, when actionable, 126.  
 when not actionable, 127.

TROVER. *See* WRONGFUL CONVERSION.

TRUSTEE may maintain trespass or conversion for injuries to goods when actual possession in cestui que trust, 214.

UNFENCED HOLE, 8.

VIEW, interruption of, is no tort, 7.

VIS MAJOR excuses, what would otherwise be actionable, 12.

VOTE, wrongful refusal to record, is a tort, 7.

WALL,

- trespass to, by sticking nails into it, 159.  
 party, 165.

WARRANT. *See* CONSTABLE.

WARRANTY, damages incurred through breach of, may be recovered, 26.

WASTE, 25.

WATER,

- causing accumulation of, whereby another's property is injured, is actionable, unless injury caused by vis major, 12  
*et seq.*  
 prescriptive right to discharge, on to another's land, 194.

WATERCOURSE,

- right to use of, vested in riparian proprietors, 190.  
 disturbance of right to use of, *ib*.  
 penning back-water in, *ib*.  
 prescriptive rights in derogation of other riparian proprietors, *ib*.  
 rights may be gained in an artificial, *ib*.

WAY,

- private, nuisance on, 131.  
 right of, 194.  
 right of, of necessity, *ib*.  
 cesser of right when necessity ceases, 195.  
 when granted right ceases with the object, *ib*.

WIFE may sue for loss caused by the killing of her husband, 144.  
*See ADULTERY.*

WINDMILL near a public highway is a public nuisance, 126.

WINDOWS. *See LIGHT AND AIR.*

WORDS. *See DEFAMATION.*

WRONGDOER,

any possession sufficient to sustain trespass against a, 214.  
 all things are presumed against a, 68.

WRONGFUL CONVERSION,

what is, 209.

destruction of goods by bailee is, 210.

purchase of goods from a person not entitled is a, even by a  
 bonâ fide purchaser, 211.

possession necessary to maintenance of action for, 213.

reversioner cannot sue for, *ib.*

reversioner's remedy, 215.

possession follows title, 213.

unauthorized delivery by bailee reverts possession in bailor, *ib.*

sale of goods by bailee's assignee reverts possession in bailor,  
*ib.*

sale by one having a lien is a conversion, *ib.*

damages for sale by person having a lien, 214.

any possession suffices against a wrongdoer, *ib.*

possession of finder, 214.

possession primâ facie evidence of title, *ib.*

when defendant may set up jus tertii, *ib.*

conversions of joint owners, 216.

subsequent conversion of lawfully obtained chattel, 210.

making inquiries as to real owner before delivering goods  
 to him is no conversion, 217.

recaption, *ib.*

ordinary remedy by action, 218.

power of judge to order restitution, *ib.*

replevin, *ib.*

waiver of tort, 219.

limitation, 221.

restitution of stolen goods, 220.

WRONGS,

division of, 3.

definition of public and private, *ib.*

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# INDEX TO CATALOGUE.

	Page		Page		Page
Accounts,		Blockade.	Deane ... 61	Consolidation Acts.	
<i>Law of.</i>		Bookkeeping,		Shelford ... .. 18	
Pulling ... .. 59		<i>Solicitors'.</i>	Coombs 45	Conspiracy,	
Actions at Law.		Boundaries.	Hunt... 46	<i>Law of.</i>	Wright ... 58
Browne ... .. 61		Brokers.	Keyser ... 60	Constitution.	
Kerr ... .. 62		Burgesses Manual.		May ... .. 26	
Williams ... .. 61		Gaches ... .. 62		Stephen ... .. 5	
Administration Bonds.		Carriers,		Constitutional History.	
Chadwick ... .. 10		<i>Inland.</i>	Powell ... 36	Fulton ... .. 27	
Admiralty,		<i>Railway.</i>	Shelford 18	Contraband of War.	
<i>Practice.</i>	Coote ... 31	Chamber Practice.		Moseley ... .. 43	
Advowsons.		<i>Com.Law.</i>	Parkinson 62	Deane ... .. 61	
Mirehouse ... .. 60		Chancery Practice.		Contracts.	
Agricultural Holdings.		Goldsmith ... .. 29		Plumptre ... .. 37	
Bund... .. 16		Hunter ... .. 62		Contributories.	Collier 48
Aliens.	Cutler ... 31	<i>Chancery Claims.</i>		Conveyancing,	
Appeals, House of Lords		Drewry ... .. 10		<i>Introduction.</i>	Lewis 21
Denison & Scott ... 7		<i>Drafting.</i>	Lewis ... 21	<i>Practice.</i>	Oke ... 56
Arbitrations.	Redman 33	Charitable Trusts.		Barry ... .. 38	
Articled Clerk.		Tudor ... .. 40		Smith ... .. 37	
Mosely ... .. 29		Church Building.		Tudor ... .. 28, 64	
Attachment,		Trower ... .. 47		<i>Forms.</i>	Barry ... 38
<i>Foreign,</i>	Brandon ... 43	<i>Pews.</i>	Heales ... 44	Crabb ... .. 30	
Average.	Crump ... 8	Church and State.		Christie ... .. 30	
Awards.	Redman ... 33	Hale ... .. 63		Kelly ... .. 33	
Banking.	Grant ... 19	Civil Law.		Shelford ... .. 30	
Keyser ... .. 60		Tomkins & Jencken 22		Rouse ... .. 34	
Bankruptcy.		Claims and Defences,		Convictions,	
<i>Manual.</i>		<i>Forms of.</i>	Drewry... 10	<i>Synopsis of.</i>	Oke ... 49
Bulley & Bund ... 48		Collieries.		Saunders ... .. 64	
<i>In County Courts.</i>		Bainbridge ... .. 25		<i>Forms.</i>	Oke ... 50
Davis ... .. 13		Colonial Law.		Co-operation.	
<i>Index.</i>	Linklater ... 61	Barbados ... .. 60		Brabrook ... .. 44	
Bar.		Commentaries.		Copyholds,	
Examination Journal 56		Stephen's Blackstone's 5		<i>Enfranchisement.</i>	
Smith ... .. 43		Phillimore's ... .. 24, 64		Rouse ... .. 44	
Pearce ... .. 60		Common Form Practice.		<i>Law of.</i>	Scriven ... 40
Barbados.	Laws of ... 60	Coote... .. 17		Coroner.	Baker ... 60
Belligerents.		Common Law,		Corporations in General.	
Hamel ... .. 60		<i>Law &amp; Equity.</i>	Chute 14	Grant ... .. 46	
Bengal Code,		<i>Practice.</i>	Dixon ... 59	Costs, <i>Law of.</i>	Gray ... 59
<i>Regulations of the.</i>		Lush ... .. 59		County Courts,	
Field ... .. 43		Kerr ... .. 62		<i>Practice.</i>	Davis ... 12
Bills of Exchange.		Companies.	Grant ... 46	<i>Practice in Equity, Bank-</i>	
Grant ... .. 19		Shelford ... .. 9		<i>ruptcy, &amp;c.</i>	Davis 13
Bills of Sale.	Hunt 15	Compensation,		<i>Practice in Admiralty.</i>	
Blackstone.		<i>Law of.</i>	Ingram ... 40	Coote ... .. 31	
Stephen's ... .. 5		Shelford ... .. 18			

	Page		Page		Page
Criminal Law.	Davis 41 Oke 49	Examinations.		International Law.	
Curates.	Field 60	Bar Examination		Deane ...	61
Customs Laws.		Journal ...	56	Hamel ...	60
Hamel ...	9	Law Examination		Phillimore ...	24, 64
Deeds.	Tudor ... 28	Journal ...	54	Intoxicating Liquors	
Descents.	Fearne ... 62	Mosely's Article		Act. Oke ...	54
Dictionary, Law.		Clerks' Handy Book	29	Joint Stock Companies.	
Mozley & Whiteley	11	Fences.	Hunt ... 46	Collier ...	48
Divorce.	Practice,	Final Examination		Shelford ...	9
Browning ...	57	Guide.	Bedford ... 22	Accounts.	Pulling 50
Domestic Servants.		Fisheries.	Bund ... 47	Judicature.	
Baylis ...	41	Oke ...	53	Baxter ...	57
Draftsman (The).		Foreshores.	Hunt ... 46	Bedford ...	22
Kelly ...	33	Williams & Nicholson	60	Dewry ...	10
Drainage.	Wilson ... 62	Forms.		Trower ...	14
Woolrych ...	28	Conveyancing.	Barry 38	Jurisprudence.	
Ecclesiastical.		Crabb 30		On Form of the Law.	
Practice.	Coote ... 63	Rouse 34		Holland ...	58
Judgment.	Bayford 63	Magisterial.	Oke ... 50	Webb ...	37
Burder v. Heath ...	63	Pleading.	Chitty ... 58	Justice of Peace.	Oke 49
Gorham Case ...	63	Greening ...	61	Labour Laws.	Davis 7
Long v. Cape Town ...	63	Probate.	Chadwick 10	Land Settlements.	
Martin v. Macko-		Frauds.	Hunt ... 15	Bund ...	62
nochie ...	63	Game Laws.	Oke ... 52	Landlord and Tenant.	
Phillimore ...	63	Gas Companies Acts.		Fawcett ...	16
Helbert v. Purchas	63	Michael & Will ...	36	Lands Clauses Acts.	
England, Laws of.		Guarantees.	De Colyar 13	Ingram ...	40
Blackstone ...	5	Highways.	Glen ... 64	Shelford ...	9
Francillon ...	61	House of Lords,		Law Dictionary ...	11
Stephen ...	5	Appeals.		Law Student's Mag.	54
English Bar.	Pearce 60	Denison & Scott ...	7	Law Studies.	Mosely 29
Smith 43		Digest.	Clark ... 27	Smith 43	
Equity,		Practice.	May ... 26	Leading Cases.	
Claims.	Dewry ... 10	Income Tax Laws.		Real Property.	Tudor ... 28
County Courts.	Davis 13	Dowell ...	39	Leases.	Crabb ... 30
Doctrine and Practice.		Indian Penal Code.		Rouse ...	34
Goldsmith ...	29	Analysis.	Cutler & Griffin 29	Legacy Duties.	
Draftsman.	Lewis 21	Indian Statutes.	Index.	Shelford ...	41
Equity & Law.	Chute 14	Field ...	43	Libel.	Starkie ... 15
Judicature.	Trower 14	Industrial Societies.		Licensing Laws.	Oke 51
Pleader.	Dewry ... 42	Brabrook ...	44	Life Assurance.	
Principles.	Roberts 13	Institutes of English		Blayney ...	60
Suit in.	Hunter ... 62	Public Law.	Nasmith 26	Lights (Window).	
Evidence,		Private Law.		Latham ...	33
County Court.	Davis 12	Nasmith ...	26	Local Government.	
Law of.	Powell ... 6			Glen ...	64
Wills.	Wigram ... 45			Locus Standi.	
Circumstantial.	Wills 43			Clifford & Rickards ...	32
				Lunacy.	Phillips ... 57
				Magisterial Law.	Oke 49
				Forms.	Oke 50
				Saunders ...	64

	Page		Page		Page
Marine Insurance.		Precedents,		Servants.	Baylis ... 41
Crump ... ..	8	<i>Conveyancing.</i> Barry	38	Sewers.	Woolrych ... 28
Maritime Warfare.		Crabb ... ..	30	Sheriff's Court.	Davis 12
Deane ... ..	61	Rouse ... ..	34	Short Hand.	Gurney 61
Hamel ... ..	60	<i>Pleading.</i> Chitty, jun.	58	Slander.	Starkie ... 15
Masters and Servants.		Preliminary Exami-		Stamp Laws.	Dowell 19
Baylis ... ..	41	nation Journal ...	56	Statutes, Table of Lead-	
Davis... ..	7	Principal and Surety.		ing.	Bedford ... 22
Masters and Workmen.		De Colyar ... ..	13	Stock Exchange.	
Lovesy ... ..	58	Private Bills.		Keyser ... ..	60
Mayor's Court Practice.		Clifford & Stephens	32	Succession Duty.	
Brandon ... ..	43	May ... ..	26	Shelford ... ..	41
Memoirs of—		Private Law. Nasmith	26	Suit in Equity.	Hunter 62
Lyndhurst ... ..	60	Prize Law. Lushington	44	Summary Convictions.	
Talfourd ... ..	60	Probate,		Oke ... ..	49
Mines and Minerals.		<i>Practice.</i> Coote ...	17	Saunders ... ..	64
Bainbridge ... ..	25	Dr. Tristram... ..	64	Tariffs and Treaties.	
Mortgages.	Fisher... 20	<i>Forms.</i> Chadwick... 10		Hamel ... ..	9
	Rouse... 34	<i>Duties.</i> Shelford ... 41		Hertslet ... ..	38
Municipal Law.		Provident Societies.		Tenancies, Agricul-	
Gaches ... ..	62	Brabrook ... ..	44	tural.	Bund ... 16
Grant ... ..	46	Public Law. Nasmith	26	Torts.	Underhill ... 23
Municipal Registra-		Railways.	Shelford 18	Trade Marks.	Adams 25
tion.	Davis ... 37	<i>Compensation.</i>		Treaties.	Hertslet ... 38
Naturalization.	Cutler 31	Ingram ... ..	40	Trusts.	Underhill ... 23
Negligence.	Saunders 35	Real Property.		<i>Charitable.</i> Tudor ... 40	
Parliamentary.		Tudor ... ..	28	Turnpike Laws.	Oke 53
Clifford & Stephens	32	<i>Chart.</i> Fearne ... ..	62	Vendors & Purchasers.	
May ... ..	26	Seaborne ... ..	42	Seaborne ... ..	42
Partition, Law of.		Referees' Court.		Water Companies Acts.	
Lawrence ... ..	46	Clifford & Stephens	32	Michael & Will ...	36
Partnership.	Dixon 35	Registration.	Davis 37	Wills.	Coote ... ..
Tudor's Pothier ...	61	Religious, <i>Doctrine.</i>		Crabb... ..	30
Patent Cases.	Higgins 39	Burder v. Heath... 63		Tudor... ..	28
Patents.	Norman ... 61	<i>Discipline.</i>		Wigram ... ..	45
Petty Sessions.	Oke 49	Long v. Cape Town	63	Winding-up.	Collier 48
Saunders ... ..	64	Reporting Cases.		Shelford ... ..	18
Pews.	Heales ... 44	Cutler ... ..	57	Window Lights.	
Pleading,		Ritual.	Bayford ... 63	Latham ... ..	33
<i>Common Law.</i> Chitty	58	Hamel ... ..	63	Wrongs.	Underhill... 23
Greening ... ..	61	Roman Law.	Gaius 42		
Williams ... ..	61	Ortolan's ... ..	32		
<i>Equity.</i> Drewry ...	42	Tomkins ... ..	42		
Lewis ... ..	21	Tomkins & Jencken	22		
Poor Law,		Salmon Fisheries.			
<i>Orders.</i> Glen ...	64	Bund... ..	47		
		Oke ... ..	53		
		Savings Banks.			
		Forbes ... ..	41		



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